Office - Supreme Court, U.S.
FILED
AUG 9 1982
ALEXANDER L. STEVAS,
CLERK

82-227

No.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1982.

PROVIDENCE JOURNAL COMPANY,
PETITIONER,

v.

HOME PLACEMENT SERVICE, INC., AND
JOSEPH P. MUSCHIANO,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

EDWARD F. HINDLE, (*Counsel of Record*),
JOSEPH V. CAVANAGH, JR.,
EDWARDS & ANGELL,
2700 Hospital Trust Tower,
Providence, Rhode Island 02903.
(401) 274-9200

DANIEL C. KAUFMAN,
WADDEY & NEWPORT,
500 Church Street,
Nashville, Tennessee 37219.
(615) 244-7545

August 9, 1982

ADDISON C. GETCHELL & SON, INC. THE LAWYERS' PRINTER · BOSTON

Questions Presented.

The Court of Appeals has held a dominant newspaper liable under the federal antitrust laws for implementing an advertising acceptability policy found by the District Court to have been formulated and adopted in the good faith exercise of the publisher's editorial judgment and for reasons unrelated to competition. The questions presented are:

1. Whether a newspaper is protected by the First Amendment in refusing to publish advertising which reason tells it should not be published.

2. Whether a newspaper is required by the Sherman Act to publish advertising believed in good faith to be unacceptable and to jeopardize the integrity of the newspaper's advertising section.

3. Whether the clearly erroneous standard set forth in Rule 52(a) of the Federal Rules of Civil Procedure was violated by the appellate court's *de novo* review of the trial court's findings of reasonableness.

Table of Contents.

Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	4
A. The Parties	4
B. The Underlying Controversy	5
C. The Proceedings Below	9
Summary of Reasons for Granting the Writ	11
Reasons for Granting the Writ	17
A. The Decision Below, in Disregard of First Amendment Principles Consistently Enunciated by this Court, Erroneously Imposed Antitrust Liability for a Publisher's Decision Concerning the Content of Its Newspaper	17
B. The Decision Below Erroneously Departed from the Construction Consistently Adopted by Other Courts of Appeals Construing the Sherman Act to Afford Even a Dominant Firm Reasonable Leeway in Customer Selection and Is Irreconcilably in Conflict with those Decisions	21
C. The First Circuit's Independent Determination of the Reasonableness of Petitioner's Advertising Policy Was a Clear Departure from the Established Standards of Appellate Review in the Federal Judicial System	26
Conclusion	29
Appendix	A1

Table of Authorities Cited.

CASES.

Allston v. Lewis, 480 F. Supp. 328 (D.S.C. 1979) 14, 19

America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., 347 F. Supp. 328 (N.D. Ind. 1972) 14, 19

Approved Personnel, Inc. v. Tribune Co., 177 So.2d 704 (Fla. Dist. Ct. App. 1965) 14

Associated Press v. United States, 326 U.S. 1 (1945) 15, 18

Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971) 14

Bloss v. Federated Publications, Inc., 380 Mich. 485, 157 N.W.2d 241 (1966), aff'g, 5 Mich. App. 74, 145 N.W.2d 800 (1968) 14

Brewster v. Ashland Publishing Corp., 345 F. Supp. 35 (W.D. Wis. 1972) 14

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) 16

Burke v. Kingsport Publishing Corp., 377 F. Supp. 221 (E.D. Tenn.), aff'd men., 497 F.2d 923 (6th Cir. 1974) 14

Byars v. Bluff City News Co., Inc., ("Byars I"), 609 F.2d 843 (6th Cir. 1979), appeal after remand, 1982-2 CCH Trade Cases ¶ 64,838 (6th Cir. July 14, 1982) ("Byars II") 16, 27, 28

Carpets by the Carload, Inc. v. Warren, 360 F. Supp. 1075 (E.D. Wis. 1973) 14

Chicago Joint Board v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), cert. denied, 402 U.S. 973 (1971) 14

Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961) 20

Franchise Realty, Etc. v. San Francisco Loc. Joint Exec. Bd., 542 F.2d 1076 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977) 20

Friedenberg v. Times Publishing Co., 170 La. 3, 127 So. 345 (1930) 14

Friedman v. Rogers, 440 U.S. 1 (1979) 25

Galaxy Rental Service, Inc. v. State, 108 Misc.2d 237, 437 N.Y.S.2d 854 (1981) 25

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 20

Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986 (9th Cir. 1979), cert. denied, 444 U.S. 1025 (1980) 20

Homefinders of America, Inc. v. Providence Journal Co., 471 F. Supp. 416 (D. R.I. 1979) 9, 13

Homefinders of America, Inc. v. Providence Journal Co., 621 F.2d 441 (1st Cir. 1980) 9, 13

Homes Unlimited, Inc. v. City of Seattle, 90 Wash.2d 154, 579 P.2d 1331 (1978) 25

In re Coachlight Dinner Theatre, Inc., 8 Bankr. 657 (Bankr. S.D.N.Y. 1981) 19

In re Louis Wohl, Inc., 50 F.2d 254 (E.D. Mich. 1931) 14

In re N.J.A.C. 11:5-1. 32 - Rental Location Operations, 179 N.J. Super. 294, 431 A.2d 855 (App. Div. 1981) 25

In re R.M.J., __ U.S. __, 102 S.Ct. 929 (1982) 25

Levinson v. Evening Star Newspaper Co., 138 F. Supp. 947 (D.D.C. 1955) 14

Lorain Journal Co. v. United States, 342 U.S. 143 (1951) 17, 24

Sacramento Data Processing, Publication & Sales v. Department of Consumer Affairs, 129 Cal. App.3d 348, 181 Cal. Rptr. 51 (1982) 25

Schuck v. Carroll Daily Herald, 215 Iowa 1276, 247 N.W. 813 (1933) 14

Six-Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc., 365 F.2d 478 (5th Cir. 1966) 16, 23, 27

Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256 (5th Cir. 1978), cert. denied, 440 U.S. 939 (1979) 16

Staff Research Associates, Inc. v. Tribune Co., 346 F.2d 372 (7th Cir. 1965) 14

Times Picayune v. United States, 345 U.S. 594 (1953) 19

United States v. Colgate & Co., 250 U.S. 300 (1919) 15, 16, 21

United States v. Kansas City Star Co., 240 F.2d 643 (8th Cir.), cert. denied, 354 U.S. 923 (1957) 24

Walker v. Providence Journal Co., 493 F.2d 82 (1st Cir. 1974) 9

Wisconsin Ass'n of Nursing Homes, Inc. v. Journal Co., 92 Wis. 709, 285 N.W.2d 891 (1979) 14, 19

CONSTITUTIONAL PROVISION.

U.S. Const. Amend. I 2, 17

STATUTES.

15 U.S.C. § 1 Passim

15 U.S.C. § 2 Passim

15 U.S.C. § 15 9

15 U.S.C. § 26 9

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2101(c) 2

Mack v. Costello, 32 S.D. 511, 143 N.W. 950 (1913) 14

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 15, 18, 19, 20

Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co., 615 F.2d 1372 (5th Cir.), cert. denied, 449 U.S. 912 (1980) 16, 22, 23, 26, 27

Mid-West Electric Cooperative, Inc. v. West Texas Chamber of Commerce, 369 S.W.2d 842 (Tex. Civ. App. 1963) 14

Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976), cert. denied, 430 U.S. 982 (1977) 14, 19

Modla v. Tribune Publishing Co., 14 Ariz. App. 82, 480 P.2d 999 (1971) 14

Newspaper Printing Corp. v. Galbreth, 580 S.W.2d 777 (Tenn. App.), cert. denied, 444 U.S. 870 (1979) 14

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) 25

Packaged Programs, Inc. v. Westinghouse Broadcasting Co., 255 F.2d 708 (3d Cir. 1958) 16, 23, 27

Person v. New York Post Corp., 427 F. Supp. 1297 (E.D. N.Y.), aff'd mem., 573 F.2d 1294 (2d Cir. 1977) 14, 19

Poughkeepsie Buying Service, Inc. v. Poughkeepsie Newspapers, Inc., 205 Misc. 982, 131 B.W.S.2d 515 (Orange Cnty. Sup. Ct. 1954) 14

Pullman Standard v. Swint, __ U.S. __, 102 S.Ct. 1781 (1982) 27, 28

Rentex, Inc. et al., 87 F.T.C. 1340 (1976) 4

Resident Participation, Inc. v. Love, 322 F. Supp. 1100 (D. Colo. 1971) 14

REGULATION.

16 C.F.R. § 238.0 25

RULE.

Fed. R. Civ. P. 52(a) i, 3, 13, 27, 28

No.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1982.

PROVIDENCE JOURNAL COMPANY,
PETITIONER,

v.

HOME PLACEMENT SERVICE, INC., AND
JOSEPH P. MUSCHIANO,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

The Petitioner, Providence Journal Company,* respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on June 18, 1982.

---

* Pursuant to Rule 28.1 of the Supreme Court Rules, Petitioner states that the non-wholly-owned subsidiaries of the Providence Journal Company are: Copley/Colony, Inc., Colony/Harbor Cablevision, Inc., Colony Microband of Massachusetts, Inc., Colony Microband of Rhode Island, Inc., Dynamic Cablevision of Florida, Inc., Greater Fall River Cable TV, Inc., Mass. Cablevision, Inc., Metro Cablevision Corp., Mobile-Pensacola Broadcasters, Inc., Network Publishing Co., Inc., Torrance Community Cablevision, Inc., Vision Cable Company of Rhode Island, Inc., and Whaling City Cable TV, Inc. Biltmore Associates is a non-subsidiary affiliate of Providence Journal Company.

Opinions Below.

The opinion of the Court of Appeals (reprinted in the Appendix at A. 1) is reported at __ F.2d __. The opinion of the District Court (reprinted in the Appendix at A. 14) has not been officially reported. In addition, the Appendix includes opinions rendered by those courts in related litigation—the unreported District Court opinion denying a preliminary injunction (reprinted in the Appendix at A. 20), the opinion of the Court of Appeals affirming the same (reprinted in the Appendix at A. 25) reported at 493 F.2d 82, the District Court opinion on the merits (reprinted in the Appendix at A. 36) reported at 471 F. Supp. 416, and the opinion of the Court of Appeals affirming the same (reprinted in the Appendix at A. 54) reported at 621 F.2d 441.

Jurisdiction.

The Judgment of the Court of Appeals for the First Circuit was entered on June 18, 1982. On July 9, 1982, the Court of Appeals entered an order staying the issuance of its mandate pending filing of this Petition by August 9, 1982. This Petition was filed within the time prescribed by the aforesaid order, and within 90 days of entry of judgment. 28 U.S.C. § 2101(c).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved.

Article I of the Amendments to the Constitution of the United States:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .

United States Code, Title 15:

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments in the discretion of the court.

Fed. Rules Civ. Proc. 52(a):

In all actions tried upon the facts without a jury ... [f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Statement of the Case.

Petitioner seeks a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the First Circuit which reversed the judgment rendered in Petitioner's favor by the United States District Court for the District of Rhode Island following a bench trial. To facilitate an understanding of the important issues implicated in this case, Petitioner will summarize the underlying facts and judicial proceedings in related litigation instituted against Petitioner by similar, albeit unaffiliated, business operations.

A. The Parties.

Petitioner Providence Journal Company (hereinafter "Journal") is a Rhode Island corporation headquartered in the City of Providence in that State. The Journal publishes daily newspapers in Rhode Island and adjacent southeastern Massachusetts. While the Journal publishes the only metropolitan daily newspapers of general circulation throughout the State, other daily and weekly newspapers and "shoppers" are published and circulated in localized areas within the larger geographic market served by the Journal.

In 1972, one Keith Walker d/b/a Homefinders (hereinafter "Walker") commenced a so-called rental referral business in Providence, Rhode Island, as a franchisee of Homefinders of America (hereinafter "Homefinders"), a Colorado corporation. Rental referral firms, which, after extracting an advance fee, provide customers with a one year "policy" entitling them to access to lists of purportedly available homes and apartment rentals, had sprung up across the country under Homefinders' direction. *See, generally, Rentex, Inc., et al.*, 87 F.T.C. 1340 (1976). Walker and Homefinders were parties to related litigation against the Journal, but were not parties below.

Respondent Home Placement Service, Inc. (hereinafter "Home Placement") is a Rhode Island corporation which entered the rental referral business in Providence in late March, 1973. It was organized by respondent Joseph P. Muschiano and others saw the opportunity "for another business to jump in and grad [sic] (grab) this [business]." Home Placement was only in operation as a rental referral firm for approximately two weeks.

B. The Underlying Controversy.

The Journal adopted a policy in early 1973 of refusing to accept advertising placed by rental referral agencies which charged a fee to obtain information pertaining to purported vacancies. That policy resulted from the Journal's experience with Walker, beginning in August, 1972, when Walker commenced placing classified advertising listing specifically described properties ostensibly for rent under columns headed "Houses for Rent," "Suburban Rentals," "Furnished Apartments," or "Unfurnished Apartments." The advertisements placed by Walker, while indistinguishable in format from those placed by landlords, were designed to attract an unusually high degree of attention by indicating, for example, that children and pets were acceptable, that utilities were paid, or that parking was available; the advertisements were sufficiently opaque in describing the property as to defy any effort by the reader to contact the ostensible landlord directly.[1] Interested prospects who responded by telephone to

[1] Walker placed as many as ten such advertisements in each edition of the newspapers published by the Journal. Representative copy in the record reads as follows:

"PROVIDENCE: Rent this darling 2 bedroom, just $125 a month. Kids O.K. Good area. 785-1112, HOMEFINDERS."

"RIVERSIDE: Large and lovely 2 bedroom, just $125 per month, major appliances. Won't last. 785-1112, HOMEFINDERS."

Walker's advertisements were not given information concerning the properties advertised when they called, but were advised to "stop by the office and register."

A mere visit to Walker's office did not, however, suffice to connect the prospect with the advertised properties. Payment of a twenty-dollar fee was required for access to information sufficient to enable the prospect to contact the landlord. Many times, the specific property which had enticed the customer was "unavailable" either because it was no longer vacant or, indeed, had never existed. Walker on occasion advertised fictitious properties to attract unsuspecting customers.

Almost immediately after Walker's classified advertising began to appear, the Journal started to receive reader complaints. Those who had responded to Walker's advertisements complained of being surprised and confused about being required to pay a fee for access to specific properties advertised in the newspapers. Other Journal readers complained of getting little or no satisfactory rental information for fees which they had paid. Certain landlords also complained that Walker had listed their properties without their permission.

In mid-September, the Journal advised Walker that it would no longer accept his advertisements. Walker thereafter agreed to include disclosure of his fee in the advertising, and the Journal resumed publication of his advertisements. The complaints, however, did not abate; indeed, their volume was so great that the Journal specially assigned one of its employees to monitor all such complaints. At about the same time, the Journal was contacted by several consumer protec-

---

"WARWICK: Beautiful setting for this 4 room, $160. Child O.K. Hurry. 785-1112. HOMEFINDERS."

"BARRINGTON: Utilities paid. Quaint 1 bedroom cottage. $20 per week. Stove and refrigerator, parking. 785-1112, HOMEFINDERS."

tion agencies which had received similar complaints.[2] By January 31, 1973, the Journal concluded that it would no longer accept advertisements placed by Walker, and, because of its experience and concern about the potential deception of its readers, implemented a policy against accepting advertising from any rental referral firm which charged prospective tenants a fee for access to rental listings. Walker was informed of the Journal's decision by letter dated February 1, 1973. About three months later, Walker closed his doors and left the state.

The Journal implemented the above-described policy to maintain a quality advertising section for its readers. After receiving complaints concerning Walker's practices and recognizing the obvious potential for abuse by similar firms, the Journal wished to disassociate itself from businesses of this type.[3]

---

[2] The Rhode Island Consumer's Council and the Better Business Bureau also received numerous complaints about Walker. These agencies contacted the Journal to inquire if the Journal was aware of the problems which consumers were having with this type of business and the advertising of it.

[3] The reason for this policy was well described by Charles P. O'Donnell, Journal Senior Vice President, as follows:

> "One of the reasons was our concern about the reaction of our readers to what would be taking place. It's essential to the economic health of our business that our readers have trust and confidence in the things that we print. Obviously, in the news end of it, it's essential—I don't mean to infer that we are always perfect with it, but we make a very real effort to see that we give as accurate information as possible to our readers. There is a whole professional aspect to the gathering of the news reporting presented properly. Those same principles of honesty and objectivity apply equally well to our advertising. We were very concerned about the numerous complaints we had received about advertising in this field, and we wanted to communicate to our readers what our policy was."

Respondent Muschiano, who by his own admission "knew quite a bit about and had many dealings with Homefinders" and saw the latter's unfavorable publicity as an opportunity "for another business to jump in and grad (*sic* grab) this" business, began operation as Home Placement in March of 1973, some six weeks after the Journal had implemented its policy. As described by Home Placement in its brief to the court below:

> "Home Placement generally followed the format for business that had been introduced into Rhode Island by Homefinders—that is, its purpose was to assist prospective tenants to locate residential property by making available to them for a fee, a catalogue of available rentals which were listed with Home Placement by landlords. The service was purchased by the consumers in the form of a contract."

Like Walker, respondents insisted that the fee be paid by prospects in advance; like Walker, respondents placed advertisements in the Journal's classified section purporting to list specific vacancies.[4] Respondents, however, denied listing fictitious properties and denied listing properties without the landlords' consent.

Initially, the Journal accepted Home Placement's classified advertising, being unaware of the nature of respondents' business. However, the Journal learned promptly of the similarity between respondents' operations and those formerly engaged in by Walker. Respondents were advised of the Journal's policy and the fact that their advertising was unacceptable. The Journal received no complaints about Home Placement. For a brief period, respondents ceased charging a fee to prospects, and their advertisements in Journal publications resumed. This was apparently inconsistent with re-

---

[4] A typical Home Placement advertisement read as follows: "SLOCUM: New duplexes, two bedrooms, 1½ baths, carpeted, built-in, $250 a month, lease. Home Placement. 828-9020."

spondents' *modus operandi*, and Home Placement ceased doing business as a rental referral firm shortly thereafter.

C. The Proceedings Below.

Walker had filed suit against the Journal, its director of advertising, the consumer protection agencies which had forwarded complaints to the Journal and their directors, and pseudonymously designated customers of Walker and the Journal. Walker claimed that the Journal's refusal to accept his advertising was violative of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and sought treble damages, injunctive relief, and attorneys fees pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26. Walker's motion for preliminary injunction was heard by District Judge Day in May, 1973, and denied (A. 20); that denial was affirmed on appeal. *Walker v. Providence Journal Co.*, 493 F.2d 82 (1st Cir. 1974) (A. 25).

Prior to trial on the merits, Homefinders was added as a party plaintiff and Walker was dismissed for failure to respond to discovery requests. Following a bench trial, District Judge Boyle entered judgment in defendants' favor, finding that the Journal had discontinued carrying Walker's advertising and had implemented its policy to protect the integrity of its classified advertising section and not for anticompetitive reasons. *Homefinders of America, Inc. v. Providence Journal Co.*, 471 F. Supp. 416, 422-423 (D.R.I. 1979). On appeal the First Circuit affirmed, concluding that the trial court's findings were not clearly erroneous, but were, indeed, "plainly right." *Homefinders of America, Inc. v. Providence Journal Co.*, 621 F.2d 441, 443 (1st Cir. 1980).

Respondents brought suit in 1977, approximately four years after Walker had commenced his litigation against the

Journal. They charged the Journal with the same violations of the antitrust laws as Walker had charged.

Trial commenced in December, 1980. The parties stipulated that the earlier record of the Walker and Homefinders case could be considered for all purposes by Judge Boyle. Respondents also offered brief testimony concerning Home Placement's operations. The trial court found that respondents operated in the same manner as Homefinders, placing advertisements for specific rental properties with a brief and untraceable description, followed by its name and telephone number, then selling a list of available properties for an advance fee. (Slip op. at 3-4, App. A15-A16). While respondents were not affiliated with Homefinders and did not seek to advertise unavailable properties, the District Court found this to be "a distinction in search of a difference." (*Id.* at 8, App. A-18.) The trial court adhered to its earlier findings that the Journal had unilaterally adopted its policy for sound business reasons. Specifically, the court found that:

> "[t]he decision of the Journal not to publish advertisements such as those involved here was not made in a vacuum ... [t]he Journal previously ran similar advertisements which resulted in customer complaints. In *Homefinders*, Plaintiff, a business similar to Home Placement, was refused space in the Journal's classified ad section after the Journal received complaints from its subscribers. The Journal decided this type of advertisement possessed too great a potential for misrepresentation with concomitant exposure to liability and disadvantageous publicity." (*Id.* at 8, App. A18).

The trial court concluded that no antitrust violation had been made out and entered judgment dismissing the action.

Respondents appealed to the Court of Appeals, which reversed the District Court's findings of fact and conclusions of

law, and held that the Journal's policy was unreasonable as a matter of law. The case was remanded for further proceedings on remedial issues only. The Court of Appeals found that the additional evidence offered by respondents established "marked differences" between the respective operations of Walker and respondents, "requiring, as a matter of law, a different result." (Slip op. at 2, App. A2.) The Court of Appeals found dispositive the lack of proof of actual deception by respondent and lack of consumer complaints against them and refused to "accept that the sale of rental information is an inherently and unfailingly deceptive practice or that advertisements for such necessarily engender complaints which affect the good will of the advertising medium." (*Id.* at 5, App. A5.) The Court further concluded that respondents' status as a competitor of the Journal for rental listings was a "special circumstance," overcoming the Journal's "presumptive[] free[dom] to choose its advertising." (*Id.* at 5, App. A5.) The Court accordingly held that Sections 1 and 2 had been violated, concluding, in essence, that the Journal's policy was unreasonable as a matter of law.

Summary of Reasons for Granting the Writ.

The instant case presents intertwined First Amendment and Sherman Act issues of fundamental importance. Never before in the history of the Republic has an appellate court, federal or state, held a publisher liable for refusing, in good faith for reasons unrelated to competition, to publish advertising which the publisher finds to be unsuitable and unacceptable.

The Journal faced with a substantial number of reader complaints concerning the deceptive advertising and the practices of a rental referral agency, had implemented a general

policy whereby it discontinued accepting classified advertisements from any such agency. This good faith policy decision—characterized by the Court of Appeals as "a paternal judgment" (Slip op. at 4, App. A4), but, in fact, at the heart of the journalistic process—was undisputedly grounded on the Journal's editorial and business judgment that its own integrity should not be compromised by association with endeavors which it considered to be of potentially questionable veracity.

This Court has unequivocably held that newspaper publishers are to be given the widest latitude in choosing what they will or will not publish. Moreover, decisions by courts of appeal consistently reserve, even to a dominant firm, reasonable leeway in selecting those with whom it will deal. In striking down the Journal's policy, the Court below departed from those established principles of both constitutional and federal antitrust law.

The District Court found that the Journal adopted the policy at issue "to minimize the chance it would run afoul of the law or harm its reputation. In other words, its refusal was a reasonable business decision." (Slip op. at pp. 7-8, App. A18.) And as the District Court observed, that decision was not "adopted in a vacuum," but followed the Journal's unfavorable experience with a similar operation—an experience which led the Journal to conclude that "this type of advertisement possessed too great a potential for misrepresentation." (*Id.* at 8, App. A18).[5] Implicit in the District Court's opinion is the finding that the Journal's stated reasons were not pre-

[5] The District Court made similar findings following trial of the Homefinders case on the merits:

> "The evidence in the record clearly shows and this Court finds that the Defendant's decision to reject Plaintiff's advertising and to institute its policy not to accept ads from fee-charging firms was not in any way intended to restrain trade or enhance Defendant's own position in the rental information market. Indeed, there is no evidence that Defendant's policy

textual and that the supposed "competition" between the newspaper and rental referral agencies played no part in the adoption of the policy. These findings, consistent with the strictures of Fed. Rules Civ. Proc. 52(a), were not set aside on appeal. Rather, the Court of Appeals refused to "accept that the sale of rental information is an *inherently* and *unfailingly deceptive* practice or that advertisements for such necessarily engender complaints which affect the good will of the advertising medium." (Slip op. at 5, App. A5 emphasis added.)[6] In so doing, the Court of Appeals erroneously placed on the Journal the burden of making the same decision as to content as the Court itself would make and, in effect, insisted that the newspaper treat each advertiser "in a vacuum" without reference to prevailing media practices. The antitrust laws do not foreclose, and the First Amendment protects, a publisher's right to formulate policies concerning the content of his newspaper. Unless deemed pretextual or augmented by other proof of anti-competitive animus—findings not made by the Court below—those policies cannot be the predicate for treble damages or injunctive relief.

---

did anything other than reduce its advertising revenues. Rather, it was sound business judgment made at a financial sacrifice, intended to maintain a quality advertising section for its readers. After receiving complaints from readers as to the quality of service Homefinder's was providing, and recognizing the obvious potential for abuse in other such firms, Defendants made a legitimate consumer-oriented decision to stop dealing with fee-charging firms." (471 F. Supp. at 422-423, App. A46-A47.)

In the *Homefinders* appeal, the Court of Appeals held that it "could not label such findings plainly wrong; indeed, they seem plainly right." (621 F.2d at 443, App. A58.)

[6] The Court of Appeals did acknowledge that, if Home Placement "adopt[ed] Homefinders' objectionable practices," the antitrust laws did not bar the Journal from discontinuing its advertising. (Slip op. 4-5, App. A4-A5)

The Court below, while acknowledging the Journal's presumptive freedom to choose its advertising,[7] nonetheless concluded that respondent's alleged status as a competitor of the Journal was a "special circumstance" calling for a different result. (Slip op. at 12, App. A12.) This "special circumstance" is entirely too slender a reed to support the Court's abrupt

[7] The Court's modest citation of a single decision for that proposition seriously understated the weight of authority, both federal and state, upholding a publisher's right to refuse advertising copy in the form or location demanded or to refuse to run such copy at all. *E.g., Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977); *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Chicago Joint Board v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); *Staff Research Associates, Inc. v. Tribune Co.*, 346 F.2d 372 (7th Cir. 1965); *Allston v. Lewis*, 480 F. Supp. 328 (D.S.C. 1979); *Person v. New York Post Corp.*, 427 F. Supp. 1297 (E.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977); *Burke v. Kingsport Publishing Corp.*, 377 F. Supp. 221 (E.D. Tenn.), *aff'd mem.*, 497 F.2d 923 (6th Cir. 1974); *Carpets by the Carload, Inc. v. Warren*, 360 F.Supp. 1075 (E.D. Wis. 1973); *America's Best Cinema Corp. v. Ft. Wayne Newspapers, Inc.*, 347 F. Supp. 328 (N.D. Ind. 1972); *Resident Participation, Inc. v. Love*, 322 F. Supp. 1100 (D. Colo. 1971); *Levinson v. Evening Star Newspaper Co.*, 138 F. Supp. 947 (D.D.C. 1955); *In re Louis Wohl, Inc.*, 50 F.2d 254 (E.D. Mich. 1931); *Modla v. Tribune Publishing Co.*, 14 Ariz. App. 82, 480 P.2d 999 (1971); *Approved Personnel, Inc. v. Tribune Co.*, 177 So.2d 704 (Fla. Dist. Ct. App. 1965); *Brewster v. Ashland Publishing Corp.*, 345 F.Supp. 35 (W.D. Wis. 1972); *Schuck v. Carroll Daily Herald*, 215 Iowa 1276, 247 N.W. 813 (1933); *Friedenberg v. Times Publishing Co.*, 170 La. 3, 127 So. 345 (1930); *Bloss v. Federated Publications, Inc.*, 380 Mich. 485, 157 N.W.2d 241 (1966), *aff'g* 5 Mich. App. 74, 145 N.W.2d 800 (1968); *Poughkeepsie Buying Service, Inc.* v. *Poughkeepsie Newspapers, Inc.*, 205 Misc. 982, 131 B.W.S.2d 515 (Orange Cnty. Sup. Ct. 1954); *Mack v. Costello*, 32 S.D. 511, 143 N.W. 950 (1913); *Newspaper Printing Corp. v. Galbreth*, 580 S.W.2d 777 (Tenn. App.), *cert. denied*, 444 U.S. 870 (1979); *Mid-West Electric Cooperative, Inc. v. West Texas Chamber of Commerce*, 369 S.W.2d 842 (Tex. Civ. App. 1963); *Wisconsin Ass'n of Nursing Homes, Inc. v. Journal Co.*, 92 Wis. 709, 285 N.W.2d 891 (1979).

departure from well-established antitrust and First Amendment jurisprudence. Quite apart from the constitutional question, the antitrust laws do not prohibit even a monopolist from exercising legitimate business judgment; the bare possession of monopoly power does not strip its holder of reasonable leeway in decision making.

Nearly four decades ago this Court acknowledged, but had no need to reach the profound constitutional questions which would be raised by an antitrust decree compelling newspaper proprietors "to permit publication of anything which their 'reason' tells them should not be published." *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945). The Court below, substituting its own notions of suitability for what it characterized as the "paternal judgment" of the Journal to protect its readers from potentially deceptive businesses, imposed just such a decree.

If the decision below is allowed to stand, either private litigants or the executive branch will have the right to use the Sherman Act to convert media outlets into mere "passive receptacle[s] or conduit[s]"—precisely what this Court in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), held a legislature could not do.

The fundamental error below goes beyond the Court's failure to weigh Petitioner's First Amendment interests in the balance, for those interests expanded the zone of reasonableness which the Sherman Act affords all businesses, media and non-media alike. This Court long ago held that, "in the absence of any purpose to create or maintain a monopoly," the antitrust laws do not bar a private commercial enterprise

> "freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

The possessor of monopoly power, moreover, is not stripped of that discretion, but maintains "some leeway in making business decisions," including refusals to deal. *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 862 (6th Cir. 1979) (*"Byars I"*), *appeal after remand* 1982-2 CCH Trade Cases ¶ 64,838 (6th Cir. July 14, 1982) (*"Byars II"*). *Accord, e.g., Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1388 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980); *Six-Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir. 1966); *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F.2d 708 (3d Cir. 1958).[8] The Court below, however, without assailing the reasonableness of the Journal's judgment that advertising by rental referral agencies as a class threatened the Journal's integrity, nonetheless insisted that the Journal blind itself to experience and treat each such agency anew. This was an impermissible narrowing of Petitioner's range of legitimate business responses to the abuses characteristic of the rental referral industry.

---

[8] The decision below relies on both Section 1 and Section 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, the former provision involving the asserted "agreement" between the Journal and Home Placement's principal, Muschiano, one which the Court below equated with a combination which "fixed a maximum price of zero" (Slip op. at 8, App. A8.) This characterization is infected with the overly simplistic and overbroad "literalness" condemned by this Court in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979). Thus, even if Muschiano's "acquiescence" in the Journal's no-fee-to-prospective-tenants policy suffices to establish the requisite concert of action (*but see, U.S. Colgate & Co., supra*, 250 U.S. at 307; *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 289 (5th Cir. 1978) *cert. denied*, 440 U.S. 939 (1979)), the Journal's insistence that referral agencies not charge their fees, whatever the amount, to the prospective tenant in advance is not subject to *per se* condemnation. The rule-of-reason inquiry thus applicable does not significantly differ from the analysis under Section 2 addressed in the text. *See Byars v. Bluff City News Co., Inc., supra*, 609 F.2d at 860.

In short, a Writ of Certiorari should issue to correct the First Circuit's deviation from constitutional precepts established by this Court and to resolve the conflict among the circuits in resolving fundamental questions arising under the Sherman Act.

Reasons for Granting the Writ.

A. The Decision Below, in Disregard of First Amendment Principles Consistently Enunciated by this Court, Erroneously Imposed Antitrust Liability for a Publisher's Decision Concerning the Content of Its Newspaper.

It must be recognized that newspaper publishers are not simply engaged in an ordinary business operation, but participate in a process protected by the constitutional guarantee that "Congress shall make no law . . . abridging the freedom . . . of the press." U.S. Const. Amend. I. This is not to say that the media are immune from antitrust scrutiny. *See, e.g., Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). Rather, where, as in the instant case, liability turns on content, the publisher operates within a larger zone of reasonableness and may take into account journalistic, as well as business, considerations.

The Court of Appeals in the earlier Homefinders case recognized that "... First Amendment rights in this case are not to be ignored ..." (621 F.2d at 443, App. A58.) That Court also stated that "... Even when it might lack proof of actual fraud, we would hesitate long before holding that a newspaper, monopoly or not, armed with both a First Amendment and a reasonable business justification, can be ordered to publish advertising against its will." *Id.* at 444, App. A60-A61. (Citations omitted).

The Court of Appeals in the instant case, however, made no accommodation for the strong First Amendment interests which are at stake when a publisher with proper motives and in good faith sets an advertising acceptability policy aimed at protecting the interests of the newspaper and of its readers. The Court of Appeals denigrates the good faith exercise of editorial judgment on the content of the newspaper, writing it off as an impermissible "paternal judgment." (Slip op. at 4, App. A4.) Such a narrow and confining approach is inconsistent with the precedents of this Court.

Although traditional First Amendment jurisprudence centers on what the press chooses to disseminate, a number of cases recognize the protection for what the press chooses to refrain from publishing. Nearly forty years ago, this Court was sensitive to the profound constitutional question which would be raised by an antitrust decree compelling newspaper publishers "to permit publication of anything which their 'reason' tells them should not be published." *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945). Thereafter, following a number of cases in which that issue implicitly passed on but not explicitly decided, this court held that such compulsion was unconstitutional. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). In unanimously striking down a Florida statute giving political candidates a "right of reply," the Court held that:

> "...[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this cru-

> cial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. 418 U.S. at 258 (footnote omitted).

The Court below, in essence, granted all who would claim to compete with the dominant newspaper in a community[9] the right of access, against the will of the publisher, to the pages of that newspaper. The logical implication of the Court's decision are disturbing. For example, one result of the Court of Appeals' holding is that a newspaper, owning a cable TV station which shows movies, could not, as a matter of editorial policy, refuse to publish the advertising of "X-rated" movies for theatre operators, who would be potential "competitors" of the newspaper and its cable TV division in the entertainment market even if the newspaper had no anticompetitive animus. *America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc.*, 347 F. Supp. 328 (N.D. Ind. 1972). If allowed to stand, the decision below reduces such newspapers to "passive receptacle[s] or conduit[s] for ... advertising,"—a result wholly at odds with the holding and rationale of *Tornillo*.[10]

---

[9] The limitation of the ruling below to so-called "monopoly" newspapers is of no practical significance, for even a decade ago only 4 percent of our large cities had two or more independently operated daily newspapers. *See, Tornillo* at 249 n.13. *See, also, Times Picayune v. United States*, 345 U.S. 594, 603 (1953) (as of 1951 "81% of all daily newspaper cities, had only one daily newspaper; 11% had two or more publications, but a single publisher controlled both or all.")

[10] A number of post-*Tornillo* cases upholding a publisher's right to refuse advertising have been explicitly grounded, at least in part, on First Amendment principles. *See, Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1075 (5th Cir. 1976); *cert. denied*, 430 U.S. 982 (1977); *Allston v. Lewis*, 480 F. Supp. 328, 334 (D.S.C. 1979); *Person v. New York Post Corp.*, 427 F. Supp. 1297, 1301 (E.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977); *Wisconsin Ass'n of Nursing Homes, Inc. v. Journal Co.*, 92 Wis. 709, 285 N.W.2d 891, ____ (1979). *Cf., In re Coachlight Dinner Theatre, Inc.*, 8 Bankr. 657, 659 (Bankr. S.D.N.Y. 1981) (broadcaster's refusal).

In disregarding the First Amendment interests involved, the decision below conflicts with established case law resolving the potential tension between the First Amendment and the Sherman Act. *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), and its progeny teach that activity which is prima facie protected by the First Amendment cannot be the predicate for antitrust liability absent a showing that the protected activity is a sham or pretext for direct economic and anti-competitive interference with a competitor. Indeed, at least one court of appeals has held that the prospect of treble damages, and of protracted and expensive antitrust litigation, poses such a threat to constitutional rights as to demand that the plaintiff meet an elevated standard of pleading and proof. *See, Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 996 (9th Cir. 1979) ("clear and convincing evidence" required to overcome presumption that litigation commenced in good faith), *cert. denied*, 444 U.S. 1025 (1980); *Franchise Realty, Etc. v. San Francisco Loc. Joint Exec. Bd.*, 542 F.2d 1076, 1082 (9th Cir. 1976) (plaintiff must make "allegations of the specific activities" not constitutionally protected), *cert. denied*, 430 U.S. 940 (1977). *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (First Amendment precludes liability without fault in actions based on content of publication).

The Journal's policy of refusing to publish advertisements carrying a high potential for deception—a policy based on past experience with a similar business and falling well within the range of journalistic reasonableness—was, under *Tornillo*, constitutionally protected. That being the case, the First Circuit's insistence that the Journal deal with rental referral agencies on an *ad hoc* basis was an intrusion into the constitutionally protected internal editorial process. Nothing in the antitrust laws authorized that intrusion because the Journal's articulated basis for the policy was, as the Court of Appeals itself recognized, not pretextual.

B. The Decision Below Erroneously Departed from the Construction Consistently Adopted by Other Courts of Appeals Construing the Sherman Act to Afford Even a Dominant Firm Reasonable Leeway in Customer Selection and Is Irreconcilably in Conflict with those Decisions.

Any analysis of refusals to deal under the Sherman Act must begin with this Court's classic statement in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919):

> In the absence of any purpose to create or maintain a monopoly, the [Sherman] Act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

The court below apparently concluded that the Journal's possession of monopoly power in the market coupled with the "special circumstances" of Home Placement's status as a competitor in that market established the prohibited "purpose to create or maintain a monopoly."

The hypothetical possibility of "competition" between rental referral firms and the classified advertising function of a daily newspaper is conceded by the Journal for purposes of this appeal. However, it must be pointed out that the record goes no further than the bare characterization of rental referral firms as "in competition" with the Journal; the extent and significance, if any, of that competition in the real world is nowhere addressed. The record in this case is totally devoid of any evidence that could serve as a basis for showing anything more than a theoretical competitive relationship between the parties. Thus, in the absence of some evidence of anticompetitive intent and substantial anticompetitive effect, the Court of Appeals' conclusion is unsupportable in the balancing of First Amendment rights and antitrust principles under the facts of this case.

The Journal's unsatisfactory experiences with Homefinders were deemed insufficient by the Court of Appeals as a predicate for the Journal's across-the-board policy of declining to print rental referral advertising. As a result, the Court of Appeals imposed on the Journal an affirmative duty to deal with competitors by accepting advertising which in its editorial judgment it had deemed to be unacceptable. In doing so, the Court unduly restricted the zone of business reasonableness which other federal courts of appeals have consistently afforded even to those in possession of monopoly power.

The conflict among the circuits is best illustrated by contrasting the decision below with that of the Fifth Circuit in *Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372 (5th Cir. 1980), *cert. denied*, 449 U.S. 912 (1980). The court there set aside a jury verdict for an independent local telephone service company ("WTC") which was refused interconnection with the existing Bell System interstate network—interconnection "essential" to the local company's ability to do business. *Id.* at 1375-1376. Bell, which wished to provide local service in the same area, based its refusal on the ground that service would constitute a wasteful duplication of facilities, not in the public interest. *Id.* at 1376-1377. After an exhaustive review of the pertinent cases, *id.* at 1387-1389, the Fifth Circuit held that the district court had erroneously taken from the jury any consideration of the public interest justifications offered by Bell. *Id.* at 1389. The appellate court was quite explicit in its mandate that the trier of fact consider all relevant factors:

> Bell's position is that the refusal was not arbitrary or motivated by anticompetitive intent, but instead was proper because Bell believed that WTC's request was contrary to the public interest. If Bell was correct in its assessment, and if its purpose in refusing interconnection was to vindicate the public interest, then the refus-

> al, despite its obvious anticompetitive effect, would have been proper and entitled to protection from antitrust scrutiny. In this case, where the public interest has not been officially determined, it is no less important for the vindication of the statutory procedure that under proper instruction the jury be allowed to consider why Bell's refusal to interconnect was reasonable under the antitrust laws because it was based on articulable concerns of regulatory policy. The important issue in this case is whether Bell's action was reasonable under antitrust law in light of the relevant factors concerning the public interest standard. *Id.* at 1390 (footnote omitted).

The court below, however, simply brushed aside the Journal's good faith "articulable concerns" about its readers and about its journalistic integrity, insisting instead that the Journal approach the question of rental referral advertising on an *ad hoc* basis.

Mid-Texas Communications, supra, is not an anomaly in antitrust jurisprudence. Quite to the contrary, the decision below is anomalous. Federal appellate courts have considered refusals by the sole VHF television station in a market to accept advertising produced by competitors. *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir. 1966); *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F.2d 708 (3d Cir. 1958). In each case, the central inquiry was the reasonableness of the refusal from a business standpoint. *See, Six-Twenty-Nine, supra,* 365 F.2d at 486 ("Standards for agency recognition go to the heart of the alleged Section 2 violation. The question of their reasonableness is the key factor in determining whether the Station had the intention of eliminating the competition of the plaintiff agency.") (footnote omitted); *Packaged Programs, supra,* 255 F.2d at 710 ("The only controversy . . . is

whether Westinghouse has exercised judgment in bona fide determination whether programs are meritorious and in the public interest, or has used its power of selection among available programs arbitrarily as an instrumentality for eliminating a competitor in program production.")

The judgment below was neither compelled nor supported by this Court's decision in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), wherein the publisher of the dominant newspaper had responded to the establishment of a competing radio station through a course of "bold, relentless, and predatory commercial behavior," refusing to sell advertising space to those local merchants who patronized its fledgling competitor. *Id.* at 148-149. Central to the Court's holding of antitrust liability in that case was the manifestly anticompetitive motive of the publisher there, untempered by any colorable business justification. *Id.* at 155. *Accord, United States v. Kansas City Star Co.*, 240 F.2d 643, 662 (8th Cir.), *cert. denied*, 354 U.S. 923 (1957). The record in the instant case is precisely to the contrary, amply supporting the trial court's finding that the Journal's "refusal was a reasonable business decision," made in an effort "to minimize the chance it would run afoul of the law or harm its reputation." (Slip op. at 7-8, App. A7-A8.) Whatever the theoretical validity of the "competition" between the Journal and rental referral agencies for the trade of landlords, the record is devoid of evidence that such "competition" was of any practical significance or played even the slightest part in the Journal's adoption of the policy in question.

The Journal regarded the abundant record evidence of deception and sharp practices by Homefinders, coupled with the nature of the rental referral business, as having established beyond peradventure the reasonableness of that policy.[11] However, given the misperception below, a brief ex-

[11] The potential and incentive for abuse and deception is rooted in the advance fee aspect of the rental referral business, leading a

planation is appropriate. This Court has never insisted that the government is obliged to address deceptive advertising exclusively on an individualized basis. Advertising of a character which "experience has proven subject to abuse" may be prohibited across-the-board. *In re R. M. J.*, ____ U.S. ____, 102 S.Ct. 929, 937 (1982). Thus, attorneys may be barred from in-person solicitation, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464-465 (1978) (prophylactic rule appropriately founded on "potential for over-reaching") and optometrists may be prohibited from practicing under trade names, *Friedman v. Rogers*, 440 U.S. 1, 12 (1979) (noting the "significant possibility that trade names will be used to mislead the public" and the numerous "possibilities for abuse"). Indeed, at least one court has sustained adminis-

---

number of jurisdictions to limit or prohibit this practice. *See, e.g., In re N.J.A.C. 11: 5-1.32—Rental Location Operations*, 179 N.J. Super. 294, 431 A.2d 855, 857 (App. Div. 1981) (advance fees limited by administrative agency in response to "documented abuses within the real estate industry"); *Homes Unlimited, Inc. v. City of Seattle*, 90 Wash.2d 154, 579 P.2d 1331, 1335 (1978) (advance fees practice banned by ordinance viewed as "important factor which encouraged the negligent and indifferent rendering of promised services"). Moreover, even if respondents refrained from the crude forms of deception practiced by Walker, their advertisements for specific properties for rent were inherently deceptive. *See, e.g., Sacramento Data Processing, Publication & Sales v. Department of Consumer Affairs*, 129 Cal. App.3d 348, 181 Cal. Rptr. 51, 55 (1982) (advertisement of specific job openings by employment referral agency misleading). It is undisputed that rental referral agencies derive no revenues from the rentals of the advertised property, instead generating income through the sale of information pertaining to rental properties available from third-party landlords. The immutable fact remains that the specific properties advertised by respondents, however truthful their description in the advertisement, could not be rented from Home Placement. Of necessity, those who rose to the "bait" by answering the advertisement were "switched" by respondents to the entirely different product which they had for sale. This is classic bait-and-switch advertising. *See*, 16 C.F.R. § 238.0.

trative regulations totally prohibiting rental referral agencies from advertising specific properties. *Galaxy Rental Service, Inc. v. State*, 108 Misc.2d 237, 437 N.Y.S.2d 854, 860 (1981) (advertising by rental referral agencies found to have "demonstrated potential for fraud and deception"). Perforce, the Journal, as a private enterprise, should not be required to have ironclad proof of deception as the predicate for deciding not to publish a category of advertising that it considers unacceptable.

The Journal articulated a basis for the advertising acceptability policy at issue—preservation of its own integrity—which was neither "facially implausible" (*Mid-Texas Communications, supra*, 615 F.2d at 1390) nor facially anticompetitive. The Court of Appeals, without overturning the trial court's finding that the articulated basis was not pretextual, substituted its own notions of reasonableness.

The Court of Appeals did so without setting aside the District Court's specific findings that the Journal's advertising acceptability policy was made in good faith and for reasons unrelated to competition (Slip op. at 7-8, App. A7-A8.) Virtually identical District Court findings were, in fact, upheld by the Court of Appeals in the related Homefinders litigation. (621 F.2d at 443, App. A58.)

The rationale of the Court of Appeals' decision limiting a newspaper's right to determine the acceptability of advertising brings it into conflict with decisions of other circuits. This conflict should be resolved by this Court.

C. The First Circuit's Independent Determination of the Reasonableness of Petitioner's Advertising Policy Was a Clear Departure from the Established Standards of Appellate Review in the Federal Judicial System.

The Court of Appeals did not and could not fault the District Court's inquiry into the genesis of the Journal's policy to

decline advertising placed by rental referral agencies which charged prospects a fee to obtain rental information. That inquiry, which considered the testimony and other evidence adduced in the related *Homefinder's* litigation, as well as further proofs pertaining to respondent's operations, was resolved in petitioner's favor, the trial court finding that the policy had been adopted in good faith for sound business reasons, *i.e.*, the protection of the Journal's editorial integrity. (Slip op. at pp. 7-8, App. A7-A8). In rejecting those findings, the Court of Appeals deviated from the standard of appellate review prescribed by Rule 52(a) of the Federal Rules of Civil Procedure, as recently applied by this Court in *Pullman-Standard v. Swint*, ____ U.S. ____, 102 S.Ct. 1781 (1982).

The decisions of other circuits cited in the preceding section make it abundantly clear that the resolution of the reasonableness question in a refusal to deal case is for the fact finder. *See, Mid-Texas Communications, supra*, 615 F.2d at 1390; *Byars I, supra*, 609 F.2d at 864; *Six Twenty-Nine Productions, supra*, 365 F.2d at 486; *Packaged Programs, supra*, 255 F.2d at 710. Thus, if one reads the decision below as *sub silentio* applying the legal analysis articulated in those decisions but setting aside the trial court's findings that the Journal acted reasonably, it is clear that the First Circuit fundamentally misconceived the proper role of an appellate court in the federal judicial system. Rule 52(a) of the Federal Rules of Civil Procedure explicitly demands appellate deference to findings of fact in non-jury trials, admonishing that such findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court of the credibility of the witness."[12]

---

[12] The First Circuit did state that it "must label as clearly erroneous the [trial] court's finding that plaintiff's new evidence 'is a distinction in search of a difference . . . The respective schemes of Homefinders are, for purposes of this proceeding, indistinguish-

It must be remembered that the record below established petitioner's adoption of its policy in response to the deceptive practices of Walker's rental referral agency and the perceived potential for abuse by any such agency. The Court of Appeals, substituting its own view for that of the trial judge, found the potential for abuse insufficient to support the broad prophylactic rule. In short, the appellate tribunal decided the central factual issue anew. Rule 52(a) required the Court below to affirm, notwithstanding its possible belief that "[t]here is little doubt that [the panel] may well have come to a different conclusion had it viewed *de novo* the evidence on the present record." *See, Byars II, supra*, 1982-2 Trade Cases at p. 72, 159.

The decision below cannot be sustained on the theory that the reasonableness of the Journal's conduct is an "ultimate" fact which an appellate court is free to determine independently, as distinguished from a "subsidiary" fact which stands unless clearly erroneous. Such a distinction, this Court recently held, is wholly without support in the letter or spirit of Rule 52(a). *See, Pullman-Standard, supra*, 102 S.Ct. at 1789. Nor was the Court of Appeals free to make findings which the trial court omitted due to a supposedly erroneous view of the law; the appropriate course in that event would be "a remand for further proceedings to permit the trial court to make the missing findings." *Id.* at 1791.

The Court below disregarded Rule 52(a)'s admonition that a district court's findings of fact, duly made after a bench

---

able.' Rather, there were marked differences, requiring, as a matter of law, a different result." (Slip op. at p. 2, App. A2.) Petitioner views this passage, despite the incantation of the phrase "clearly erroneous," to reflect the appellate court's disagreement as to the appropriate legal analysis, rather than its rejection of the trial court's findings of fact. There is no suggestion in the remainder of the opinion below that the trial court was mistaken in his understanding of how either respondents or Walker had operated.

trial, are not to be set aside unless clearly erroneous. A Writ of Certiorari should accordingly issue to correct the First Circuit's departure from the accepted and usual course of appellate review.

Conclusion.

Newspaper publishing companies across the nation continually exercise their reasoned discretion in selecting material appropriate for their readership and consistent with journalistic integrity and image. The sheer volume and regularity of those activities underscore their importance. Prior to the decision below, other courts of appeals had consistently applied the Sherman Act so as not to foreclose even a dominant firm, whether or not a mass media outlet, from exercising reasonable business judgments in choosing those with whom it would deal. The decision below—inconsistent with decisions of other courts of appeals—injects confusion and uncertainty into this sensitive area. The Court below, compounding its departure from settled antitrust principles, intruded into an area which, this Court has held, the First Amendment reserves to the publisher's exercise of reasonable journalistic judgment. Accordingly, a Writ of Certiorari should issue to resolve this significant question arising under federal antitrust law and to correct the First Circuit's deviation from core constitutional principles.

Respectfully submitted,

EDWARD F. HINDLE,
Counsel of Record,
JOSEPH V. CAVANAGH, JR.,
EDWARDS & ANGELL,
2700 Hospital Trust Tower,
Providence, Rhode Island 02903.
(401) 274-9200

DANIEL C. KAUFMAN,
WADDEY & NEWPORT,
500 Church Street,
Nashville, Tennessee 37219.
(615) 244-7545

United States Court of Appeals
For the First Circuit

No. 81-1783

HOME PLACEMENT SERVICE, INC. et al.,

PLAINTIFFS, APPELLANTS,

v.

THE PROVIDENCE JOURNAL COMPANY,

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[HON. FRANCIS J. BOYLE, *U. S. District Judge*]

Before

COFFIN, *Chief Judge*,
ALDRICH and BOWNES, *Circuit Judges*.

Ralph J. Gonnella, for appellants.
Joseph V. Cavanagh, Jr., with whom *Knight Edwards* and *Edwards & Angell* were on brief, for appellee.

June 18, 1982

ALDRICH, *Senior Circuit Judge*. This action under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, is the second against defendant newspaper publisher, Providence Journal Company, for refusal to accept so-called rental information advertising in its classified columns. The first resulted in two decisions of this court, *Walker* v. *Providence Journal Co.*, 1 Cir., 1974, 493 F.2d 82, and *Homefinders of America, Inc.* v. *Providence Journal Co.*, 1 Cir., 1980, 621 F.2d 441, ending favorably to the defendant. The present one is brought by a new, unconnected plaintiff, Home Placement Service, Inc.[1] In the first we held that even though defendant may have had a monopolistic position, it was justified in

[1] Joseph P. Muschiano, president of Home Placement, is also named as a plaintiff. For convenience, we will refer to Home Placement, singly, as plaintiff.

refusing the advertising because of its deceptive nature. Defendant contends that the present case is simply a replay. The district court agreed, and entered judgment for the defendant. Plaintiff appeals.

It is true that the record in the prior case was introduced herein for all purposes, and that the nature of plaintiff's business followed the same format as Homefinders, sometimes known, generally, as Rentex, but there was further evidence, which plaintiff asserted made a substantial difference. Unfortunately, so far as easy disposition of this appeal is concerned, we must label as clearly erroneous the court's finding that plaintiff's new evidence "is a distinction in search of a difference. . . . The respective schemes of Homefinders and Home Placement are, for purposes of this proceeding, indistinguishable." Rather, there were marked differences, requiring, as matter of law, a different result.

Homefinders' "scheme" was to advertise an individual rental with a brief and untraceable description, followed by a telephone number. The number was Homefinders'. The responder would be "told that the property advertised was no longer available, but if the prospective tenant would merely come to Homefinders' office and pay the fee of $20, other listings would be made available." *Homefinders of America, Inc.* v. *Providence Journal Co.*, D.R.I., 1979, 471 F. Supp. 416, 420. Homefinders' advertisement frequently was totally misleading — the property had never been available, indeed, often there never was such; the sole purpose of the ad was to sell the prospect a list of other properties. These further properties, even if available, and some were not, would not measure up to the attractive description in the fictitious advertisement, nor could the prospect discover this until he had made his payment. Disappointment, or worse, was a frequent consequence.

The present plaintiff, also, was endeavoring to sell a list of properties for which it required payment in advance, but there was no misrepresentation as to the availability of, or as

to the description of, the particular item advertised. The statement in defendant's brief that the "ads were similar, if not identical in form, to the ads placed by Homefinders" is not true, either as to availability, or description. The district court had found that Homefinders' ads were "calculated to attract an unusual degree of attention. . . . For example, its advertisements stated that children and pets were welcome, utilities were paid and automobile parking was available." *Id.* This was readily accomplished because, as we said on appeal, the bait was artificial. 621 F.2d, ante, at 444. While plaintiff, also, had as its primary purpose the sale of lists, it did not use deceptive bait, and the court's finding that Home Placement's and Homefinders' schemes "both amounted to bait-and-switch artifices which employed misleading advertising" was an inaccurate equivalency.

As a result of Homefinders' advertisements, defendant received continuous complaints from its readers — defendant's brief described it as a "torrent." In addition to the unavailability of the property advertised, or, after payment, anything similar, readers, as well as the owners themselves, were sometimes put out by the fact that Homefinders listed properties without authority. The totality of complaints was, naturally, upsetting to defendant. It responded by adopting a policy, set forth daily in its classified section, of not knowingly accepting "advertising where a fee is required to obtain rental information," and, when the present plaintiff applied, adhered to it.

We had no difficulty in holding, quite apart from whether the other aspects of the Sherman Act were satisfied — a question we did not reach — that defendant was not required to "immolate itself" by publishing Homefinders' misleading advertisements of which its readers justifiably complained. In the present case plaintiff's was a new business, and was cut off almost immediately. Rather than a "torrent" of complaints, there was not even a trickle.[2] Our first question, ac-

[2] The concluding sentence in this part of the court's opinion, "It

cordingly, must be whether plaintiff's "scheme" was still sufficiently objectionable to warrant the Homefinders treatment.

Defendant has a number of difficulties. Not only were there no actual complaints, but defendant failed to show any basis for any, either that the specific advertised property was false or exaggerated, or that plaintiff engaged in unauthorized listing. There was no evidence that it intended to do so. The substantive difference between plaintiff and Homefinders is analogous to the difference between a retailer who has, and advertises, a so-called lead, or loss-leader, to attract customers who will, hopefully, purchase other articles as well, and one who misrepresents a lead which, in fact, does not exist. The first practice is customary and ethical. The court's finding that "switching to a list of properties ... using as bait an ad for a single [available] property" was deceptive bait-and-switch, would mean that every broker who advertised a single listing, and hoped that if a prospect found he did not like that one he might sell him another, is a bait-and-switcher. This is inconceivable.[3]

It is true that there was evidence that a reader of classified real estate advertisements may expect that there will be no charge to him. The evidence was that in Rhode Island either the advertiser is the lessor himself, or, if a broker, he will be paid by the lessor. Whether, in order to avoid any possible misunderstanding, defendant could reasonably have required that the fee be disclosed in the advertisement was an alternative not proffered by defendant. Its announced policy made it clear that it would not publish plaintiff's ads even with such disclosure. For this it had no valid business reason. Were plaintiff subsequently to succumb, and adopt Homefinders'

---

was only a matter of time before the complaints rolled in," must have been an inadvertency for "before the complaints would roll in." Even read as a prognosis, no basis was shown for it.

[3] We note that the FTC's order against Homefinders, *In the Matter of Rentex, Inc., T/A Homefinders*, 1976, 87 F.T.C. 1304, referred to in our prior opinion, did not find the sale of rental information improper as a matter of principle, but was based on the subjective misconduct.

objectionable practices, complaints would follow and defendant could then stop receiving the advertisements. We cannot accept that the sale of rental information is an inherently and unfailingly deceptive practice, or that advertisements for such necessarily engender complaints which affect the good will of the advertising medium.

Nor can we accept defendant's apparently paternal judgment[4] that the public should not have to pay a fee to find housing. This is a matter to be resolved through the workings of the marketplace.[5] Some persons might well prefer to pay a small fee for a genuine list than to have to pay, indirectly, the larger brokerage commission incurred by the lessor. If, on the other hand, the public were to find plaintiff's business unsatisfying, presumably it would die a natural death. Surely no newspaper can be thought to guarantee that everything it advertises is a superlative bargain, or could claim such a standard as an anti-trust defense.

This is not to say that defendant was not, as a newspaper, presumptively free to choose its advertising. Defendant testified, for example, that it would not advertise handguns,

---

[4] In a pretrial deposition, defendant gave its reasons for adopting its policy as follows.

> "It was established because we had over these months and over these problems come to a conclusion that if we set up the policy it would be a good thing for our readers and also consistent with our advertisers, and discussed it with people in the business who felt that ordinary normal rental charges are sufficient for the rental agencies to receive commissions or whatever from the renter or the person owning the property, and so forth, and we didn't feel our readers should have to pay on top of the rental for this service. Also, it's apparent to us that a lot of the people who respond to advertising of Homefinders type were those who were easily taken advantage of, people with low income, large families, disadvantaged people, blacks, and so forth, who have trouble finding rentals and would pay the fee for finding rentals because of their problems of finding suitable vacancies."

[5] We have already noted in *Homefinders*, 621 F.2d, ante, at 442, that "[d]efendant is not permitted to act as a protector of the public. . . ."

or acupuncture. Absent special circumstances, it could choose not to carry any particular advertisement or type of advertising. *E.g., PMP Associates, Inc.* v. *Globe Newspaper Co.*, 1975, 366 Mass. 593. The difficulty here is that plaintiff alleged special circumstances. So did Homefinders. We did not reach those circumstances there because, as to that plaintiff, defendant had a legitimate business justification for rejecting the advertisements, and we would not allow Homefinders to "piggy-back on the rights of other parties." 621 F.2d, ante, at 444. Plaintiff here, however, is asserting its own rights. We turn, accordingly, to the anti-trust aspect of the case and, because the court did not reach it here, but did reach it in *Homefinders* and the record is the same, we consider the district court's findings in that case, 471 F. Supp., ante. Basic to its decision was the following.

> "The evidence in the record clearly shows and this Court finds that the Defendant's decision to reject Plaintiff's advertising and to institute its policy not to accept ads from fee-charging firms was not in any way intended to restrain trade or enhance Defendant's own position in the rental information market. Indeed, there is no evidence that Defendant's policy did anything other than reduce its advertising revenues. Rather, it was sound business judgment made at a financial sacrifice, intended to maintain a quality advertising section for its readers." 471 F. Supp., ante, at 422-23.

It was simply not so in *Homefinders*, or in this case, that there was no evidence that defendant's refusal to deal did anything other than reduce its advertising revenues. There was introduced on behalf of Homefinders, and reintroduced on behalf of Home Placement, extensive testimony by a qualified expert that a rental referral business is in competition with a newspaper selling more traditional forms of advertising rentals because it is "removing potential buyers of . . . classified advertising." Since plaintiff lists individual lessors without charge, originally and ultimately, if its service

became favorably known it could siphon off lessors by saving them the cost of defendant's columns. This evidence of direct competition was uncontradicted, and given its logic, there was no basis for rejecting it. What is more, during trial, the court specifically accepted it. It interrupted plaintiff's questioning of its expert by remarking, "We have already established through this witness that [in that case, Homefinders] was competing with the Providence Journal." This is the opposite of the court's later statement that there was no evidence that defendant's foreclosing plaintiff did anything other than reduce its revenues. By this final, totally unsupported, finding, the court improperly undercut plaintiff's entire case.

Complementing the testimony about direct competition was testimony that for rental referral services the classified section of the largest metropolitan newspaper in the area is not only the primary, but the essential medium for survival. It is even required for larger transactions, sales.[6] In the geographical area to which plaintiff appealed, plaintiff's needs were such that the smaller dailies could not be sufficient. This evidence, sniped at by showing certain alleged local exceptions, but otherwise uncontradicted, indicates the simplest form of attempted strangulation of a competitor by refusal to deal. The only question is, did it give plaintiff a case. We hold that it did, under both sections 1 and 2 of the Act.

We believe the court's finding there was no section 1 claim for lack of a contract, combination or conspiracy in restraint

---

[6] Thus one of the state's prominent brokers testified,

A. "We have not tried television to sell or rent a specific product or, if we have tried it, it's on a very limited basis, and the same would apply to radio, if and when we have tried it it's been on a very limited basis.

Q. "Why is that?

A. "Well, it's our opinion that the real estate purchasing segment of the public has been trained to do much of their real estate purchasing in the classified section, therefore, we respond to what we feel is the custom of the purchasing real estate public."

of trade, was wrong as a matter of law. Shortly after defendant announced its policy, plaintiff's president, Muschiano, was told, when he called in proposed advertising copy, that plaintiff's advertisements could not be accepted. This, we agree, was in itself unilateral, and permitted by *United States* v. *Colgate & Co.*, 1919, 250 U.S. 300. But matters did not end there. When told plaintiff's ads would not be accepted, Muschiano promised no longer to assess a fee in connection with properties advertised in the Journal, and on that basis, defendant agreed to resume publishing plaintiff's rental advertising.[7] The Court has repeatedly found concerted action present when it could be determined from a course of conduct that retailers agreed, in response to a manufacturer's request, or through coercion, to a manufacturer's conditions of doing business. *E.g.*, *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 38-46 (discussing cases); *Albrecht* v. *Herald Co.*, 390 U.S. 145. In the present case plaintiff expressly agreed to defendant's condition, viz., not to charge a fee in connection with advertised properties. Indeed, defendant could not readily implement its policy without plaintiff's agreement, it being impossible to tell from the face of an advertisement whether it required the payment of a fee. Since in the absence of defendant's policy, plaintiff would have charged a fee with respect to some of the advertised properties, a combination was formed which, in effect, fixed a maximum price of zero on plaintiff's sale of rental information. This is sufficient concerted action to bring defendant's conduct within the ambit of section 1, as it is settled

[7] The court made no findings in this regard, but these facts are undisputed. Corroborating Muschiano's testimony as to these events, a memo written by defendant's Manager of Classified Advertising states that Muschiano

> "informed me that his organization was no longer going to charge a fee for rental referrals or rental information service."
>
> "I told him at this time he could begin running his rental advertising again."

that a plaintiff can claim an unlawful combination between defendant and itself as of the day it unwillingly agreed to comply with defendant's restriction. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 1968, 392 U.S. 134, 142; *Albrecht* v. *Herald Co.*, 390 U.S., ante, at 150 n.6; *see Parke, Davis & Co.*, 362 U.S., ante, at 45 n.6. Finally, the restraint cannot be upheld as "reasonable" when it served no legitimate business purpose, and tended not to protect, but to destroy, competition. *Cf. Chicago Board of Trade* v. *United States*, 1918, 246 U.S. 231, 238.

While we consider the court erred in holding that section 1 had not been violated, if, possibly, there could be a question of fact here, there can be none with respect to section 2. The evidence fully supported plaintiff's theory, as viewed by the court, that "the Journal was using its dominance in the newspaper advertising market to foreclose competition in the housing vacancy information market." Although the court found defendant lacked monopoly power, the record was to the contrary. To some extent, plaintiff helped to misdirect the court by attempting to prove that defendant monopolized the sale of newspapers and classified advertising throughout the Providence-Pawtucket-Warwick SMSA, an area consisting of much of central and northern Rhode Island, and parts of southern Massachusetts. We tend to agree that even in this larger market the court's finding no monopoly was not supported by the evidence, but there was no need to define either the product, or the geographic market, so broadly.

The relevant market is "the narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market." Sullivan, Antitrust 41 (1977). Or, as the Court has put it, "[C]ommodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal." *United States* v. *E. I. DuPont de Nemours & Co.*, 1956, 351 U.S. 377, 395. *See generally George R. Whitten, Jr., Inc.* v. *Paddock Pool*

Builders, Inc., 1 Cir., 1974, 508 F.2d 547, *cert. denied*, 421 U.S. 1004. Thus, the relevant product is not all advertising, or even all classified advertising, but merely daily newspaper rental advertising. Defendant offered no rebuttal of plaintiff's substantial evidence, through numerous witnesses, that there was no effective substitute therefor. The court's reference to the alternatives of "radio, television, [and] billboard," overlooked the uncontradicted testimony of experts, and those in the business, that these are effective only for institutional advertising, in conjunction with, but not in substitution for, more specific daily newspaper ads. Nor are weekly newspapers an adequate substitute, precisely because they offer competition only once a week. In short, on the evidence, none of the alternative media identified by the court could be said to be "reasonably interchangeable" with, or competing "on substantial parity" with, the rental columns of daily newspapers.

As for the geographic bounds of the market, the court found that defendant maintained a circulation advantage of 152,379 to 5,846 within the so-called Providence City Zone, consisting of Providence and ten surrounding communities, including Warwick, Cranston, and, significantly, West Warwick, where plaintiff was situated. It has not been disputed, nor could it be, that within this zone defendant had a monopoly over the sale of newspapers. *See Lorain Journal* v. *United States*, 1951, 342 U.S. 143. Correspondingly, though the court did not pass on the matter, the evidence compels the conclusion that defendant had monopoly power in the sale of newspaper advertising for rental units located within the City Zone. The only daily newspapers allegedly competing with defendant for rental listings were smaller, local papers scattered about, mostly outside the City Zone, notably in Pawtucket and Woonsocket, Rhode Island, and Attleboro, Massachusetts. All of these combined accounted for a market share of 25 per cent, compared to the Journal's 75 per cent, in the Providence-Pawtucket-Warwick SMSA. Whatever ad-

vertising competition these locals offered in their respective areas, they were not effectively competing with the Journal, individually or collectively, for the advertisement of property located with the City Zone. Broker and expert testimony confirmed that the owner of property in Providence or Warwick would not consider it a viable alternative to the Journal to advertise exclusively in, say, the Woonsocket Call, or, for that matter, to pay the greater expense of advertising in several, or all, of the locals, when none had any significant readership in the general area where the property was located. That the Journal could hike its classified advertising prices without fear of competition from the locals is reflected by the fact that defendant was charging substantially higher rates for a line of advertising than any of these alleged competitors.

The court's only response, that "there is no evidence to support in any fashion the contention that [the City Zone] is an existing submarket for renter information," misses the point. The purpose of market definitions is not to frustrate anti-trust plaintiffs by requiring the proof of bright lines which do not exist, but is to help identify monopoly power, that is, "the power to control prices or exclude competition." *United States* v. *E. I. DuPont de Nemours & Co.*, 351 U.S., ante, at 391. The breadth with which one defined the "submarket for renter information" could not possibly hide the fact that within the City Zone, defendant had an uncontested lock on the sale of rental listings. Plaintiff's case is not defeated by showing that some readers outside the City Zone might be interested in renting within it. As plaintiff's expert testified, utilizing the locals to reach these readers would not provide "any meaningful circulation within your market area that you're trying to do business in." It would be "leaving out your primary area of doing business, and trying to hit markets that surround your area of doing business," whereas, with the Journal, "you're hitting your primary market area rather than all of these peripheral areas." Again, this testimony was unrebutted, and, again, there was no basis for disregarding it. In sum, the only reasonable con-

clusion to be drawn from the evidence was that with respect to the sale of rental advertising within the City Zone defendant was a monopolist.

Defendant's second, alternative, line of defense, also adopted by the court, was that whatever monopoly power it possessed had not been used unlawfully. This, too, we find erroneous. As previously discussed, firms such as plaintiff posed a potential threat to defendant's monopoly position. If plaintiff were successful, it could siphon off defendant's advertisers, and essentially redefine the market for the listing of rental information, thereby perhaps forcing defendant to lower its advertising prices. Because of its monopoly over rental listings in the general area where plaintiff was attempting to operate, the Journal's refusal to run ads where a fee was charged put plaintiff out of the rental referral business. We have held that this refusal was not supported by a legitimate business reason. In the absence of such, defendant's use of monopoly power to destroy a potential competitor was a violation of section 2. *E.g., Lorain Journal* v. *United States,* ante; *Gamco, Inc.* v. *Providence Fruit & Produce Building, Inc.,* 1 Cir., 1952, 194 F.2d 484, *cert. denied,* 344 U.S. 817. It makes no difference that defendant's motives may be claimed to have been pure. Specific intent is necessary only when an attempt to monopolize is alleged. *See Times-Picayune Pub. Co.* v. *United States,* 1953, 345 U.S. 594, 626. Lack of bad purpose is irrelevant where the defendant already possesses monopoly power and, without justification, uses it to exclude competition. *United States* v. *Griffith,* 1948, 334 U.S. 100, 105. *Byars* v. *Bluff City News Co.,* 6 Cir., 1979, 609 F.2d 843. We agree with the court in *Byars* that "what should matter is not the monopolist's state of mind, but the overall impact of the monopolist's practices." *Id.* at 860. When the foreseeable and proximate consequence of defendant's conduct was unreasonably to perpetuate an already existing monopoly by excluding a potential competitor, it would be of no solace to plaintiff, or the consumers the anti-trust laws were designed to protect, that defendant may not have been seeking this result.

Plaintiff sought relief in the form of treble damages, attorney's fees, and an injunction. Further proceedings will be necessary to determine the appropriate form of injunctive relief, if any is needed, and the amount owing in damages and attorney's fees.[8] We add that this is a case where it would be easier all around, including for the judge himself, without any possible reflection on him, to have the further proceedings before another trier. Our reasoning on this subject is set out in *O'Shea* v. *United States*, 1974, 491 F.2d 774, 778-79. This is an automatic rule in some other districts, but, in case it is not in Rhode Island, we so request here.

Reversed and remanded for further proceedings consistent herewith.

[8] We offer no opinion on whether plaintiff's claim for damages might have been waived.

IN THE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

HOME PLACEMENT SERVICE, INC. and JOSEPH MUSCHIANO	:	
PLAINTIFFS	:	
	:	C.A.
v.	:	No. 77-158
	:	
PROVIDENCE JOURNAL COMPANY	:	
DEFENDANT	:	

MEMORDANDUM

BOYLE, Francis J., District Judge.

In this action Plaintiff Home Placement Service, Inc. and Joseph Muschiano [hereinafter, Home Placement], charge Defendant Providence Journal Company [hereinafter, the Journal] with violations of Sections One and Two of the Sherman Act. 15 U.S.C. §§ 1, 2 (1976).

Home Placement is a rental referral service. For a fee, Home Placement promises prospective apartment and house tenants that it will provide them, for one year, with a list of available apartments and houses.

The Journal publishes Sunday and daily newspapers which circulate throughout Rhode Island and parts of Connecticut and Massachusetts. The Journal refused to carry Home Placement's advertisements in its papers' classified section. The Journal's announced policy is not to accept any advertisements from companies such as Home Placement, that is, companies which charge prospective tenants a fee for rental information.

Home Placement argues this refusal constitutes an abuse of monopoly power in contravention of Section Two of the Sherman Act. In addition, Home Placement argues that when it acceded to the Journal's policy by no longer charging for rental information, a combination or conspiracy was formed between the Journal and Home Placement in violation of Section One of the Sherman Act. The arguments of Home Placement are without merit.

This action follows upon the heels of an earlier action involving the same Defendant, similar contentions and a different plaintiff, Homefinders of America, Inc. *Homefinders of America, Inc. v. Providence Journal Co.*, 621 F.2d 441 (1st Cir. 1980); *Walker v. Providence Journal Co.*, 493 F.2d 82 (1st Cir. 1974).[1] Those actions have essentially similar facts and the parties agree that the record in those actions may be used as the basis for determining this action, with the additional facts that this Plaintiff, Home Placement, did not seek to advertise unavailable property and has no association with the plaintiff in the earlier action, Homefinders of America, Inc.

Both Homefinders and Home Placement provided information through classified advertising in the Journal's newspapers, concerning the availability of residential rental properties. In the case of *Homefinders*, which began its business first in the area of Providence, Rhode Island, some of its ads were deliberately misleading: The ads described property known to be unavailable. When a prospective tenant responded to the ad, he or she was told that the advertised

[1] Walker, plaintiff in the first case, *Walker v. Providence Journal Co.*, was a franchisee of Homefinders of America, Inc. Homefinders later joined the litigation as a plaintiff. When the second case, *Homefinders of America, Inc. v. Providence Journal Co.*, was decided by the Court of Appeals, only Homefinders remained a plaintiff.

property was unavailable, but that for a fee, Homefinders would provide a list of available properties.

The evidence is that Home Placement provided the same type of rental service. The modus operandi of both services was similar. Prospective tenants were charged a small fee. Landlords whose properties were listed paid no fee. Both Plaintiffs advertised particular properties. Both services could not succeed without a high volume of tenant-clients.

Home Placement was organized in March of 1973, in order to provide a Homefinders type of operation. Home Placement's manager, Mr. Muschiano, testified that its purpose was to "run it on the idea of Homefinders." Although, Mr. Muschiano, had available a number of apartments which he himself controlled, the same bait used by Homefinders was used by Home Placement: A prospective tenant who called was told that a list of rental apartments was available for a fee of twenty dollars.

Although the advertisements submitted by Home Placement might have accurately represented actual vacancies, the practice of advertising a single property as available and then switching to a list of properties was not different in either substance or effect from the Homefinders operation. Home Placement was also a scheme to sell a list of rental opportunities for a fee using as bait an ad for a single property.

Home Placement submitted this type of advertisement for no more than two weeks, until the Journal announced its new policy, on April 13, 1973, not to knowingly accept advertisements where a fee is required to obtain rental information. Although during this time the Journal received no complaints concerning Home Placement, this is more probably attributed to the short period of time that Home Placement plyed its trade. It was only a matter of time before the complaints rolled in.

SECTION TWO CLAIMS

Home Placement demonstrates no violation of Section Two. The Sherman Act forbids monopolization and attempts to monopolize. 15 U.S.C. § 2 (1976). Monopoly power, the power to raise prices and exclude competition, is not, without more, violative of Section Two. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Section Two violations have been found, however, where a monopolist abused its position in the market where it competed. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). In order to succeed with its claim, therefore, Home Placement must show both monopoly power and abuse of that power. Home Placement shows neither.

Home Placement has not shown the existence of monopoly power. *Homefinders of America, Inc. v. Providence Journal Co.*, 471 F. Supp. 417, 423 (D.R.I. 1979), *aff'd on other grounds*, 621 F.2d 441 (1st Cir. 1980).

In *Homefinders*, the Plaintiff alleged the relevant product market was the "housing vacancy information market." Plaintiff then argued that the Journal was using its dominance in the newspaper advertising market to foreclose competition in the housing vacancy information market. Plaintiff alleged a cause of action. Unfortunately, Plaintiff did no more: Plaintiff failed to define the housing vacancy information market. Plaintiff failed to introduce evidence defining the market despite the admonition of the Court of Appeals in an earlier episode of the same case. *Walker v. Providence Journal Company*, 493 F.2d 82 (1st Cir. 1974). Plaintiff in *Homefinders* failed to prove a Section Two violation because it failed to define the relevant product market. Inasmuch as Plaintiffs in the case at bar rely on *Homefinder's* record, their claim must fail for the same reason.

Assuming, for argument's sake, the existence of monopoly power, Home Placement has not proved its case, *i.e.*, it has not shown the requisite "bad conduct." Home Placement points to the Journal's alleged monopoly power and argues that the Journal's refusal to deal, without more, is violative of the Sherman Act. This argument is congruous with neither logic nor law.

The propriety of the Journal's refusal rests on firm ground: it sought to minimize the chance it would run afoul of the law or harm its reputation. In other words, its refusal was a reasonable business decision.

The decision of the Journal not to publish advertisements such as those involved here was not made in a vacuum. As discussed earlier, the Journal previously ran similar advertisements which resulted in customer complaints. In *Homefinders*, Plaintiff, a business similar to Home Placement, was refused space in the Journal's classified ad section after the Journal received complaints from its subscribers. The Journal decided this type of advertisement possessed too great a potential for misrepresentation with concomitant exposure to liability and disadvantageous publicity. The Journal thereafter refused advertisements from all those who would charge for rental information.

Home Placement argues *Homefinders* is distinguishable. It argues that unlike Homefinders, which advertised unavailable properties, it did not. This is a distinction in search of a difference. As stated earlier, the respective schemes of Homefinders and Home Placement are, for purposes of this proceeding, indistinguishable. Both amounted to bait-and-switch artifices which employed misleading advertising. It goes without saying that, monopoly by power or not, the Journal will not be compelled to further a fraud on the marketplace. *Homefinders*, 471 F. Supp. at 422-23.

Consequently, the Journal's refusal does not violate Section Two.

SECTION ONE CLAIMS

The Sherman Act forbids contracts, combinations, and conspiracies in restraint of trade. 15 U.S.C. § 1 (1976). After the Journal announced its policy, Plaintiffs acquiesced, that is, Plaintiffs stopped charging prospective tenants for rental information. Plaintiffs argue this acquiescence formed the requisite combination or conspiracy for a Section One violation. The Journal's refusal was unilateral; there was no combination or conspiracy. *Homefinders*, 471 F. Supp. at 421-22, *aff'd on other grounds*, 621 F.2d 441 (1st Cir. 1980). *Compare United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) *with Albrecht v. Hereld Co.*, 390 U.S. 145, 150 n.6 (1968) *and United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).[2]

Accordingly, judgment is entered for the Journal for costs.

FRANCIS J. BOYLE,
UNITED STATES DISTRICT JUDGE

September 24, 1981.

---

[2] Plaintiffs point to footnote six of *Albrecht* in support of their claim. *Albrecht* is inapposite. In *Albrecht* the defendant sought to maintain resale prices, a *per se* violation of Section One. No allegation of price fixing is made in the case at bar.

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND

KEITH WALKER, d/b/a HOMEFINDERS,	)	
	)	
Plaintiff	)	
	)	CIVIL
v.	)	ACTION
	)	No. 5133
THE PROVIDENCE JOURNAL COMPANY, ET ALS.	)	
	)	
Defendants	)	

OPINION

September 6, 1973

DAY, District Judge. In this civil action the plaintiff seeks damages and declaratory and injunctive relief against seven defendants. The defendants named in the plaintiff's lengthy complaint are The Providence Journal Company; George Bellano, individually and in his capacity as director of advertising for the Providence Journal Company; The Better Business Bureau of R. I. Inc.; John Aiello, individually and as operations manager of The Better Business Bureau of R. I. Inc.; Rhode Island Consumer's Council; Edwin T. Palumbo, individually and in his capacity as director of said Rhode Island Consumer's Council, and Albert West, individually and in his capacity as director of the Rhode Island State Department of Business Regulations.

In his complaint, which was filed on March 6, 1973, the plaintiff alleges that he operates a home rental information service in the State of Rhode Island under the name of

"Homefinders" for which he charges subscribers thereto an annual fee of twenty dollars ($20). He further alleges that he placed advertisements of the availability of his services in the newspapers of the defendant, The Providence Journal Company, from August 4, 1972 until January 31, 1973, except for a period of suspension in September, 1972, and that on February 1, 1973, he was advised by said defendant that his advertisements would no longer be accepted and that his classified advertising contract was cancelled.

Plaintiff claims that said refusal to publish his advertisements was in furtherance of a conspiracy by the defendants to lessen competition and constitutes a *per se* violation of 15 U.S.C. § 1 and alternatively a violation of 15 U.S.C. §§ 2, 13 and 18.

This action is before me at this time on the prayer of the plaintiff for a preliminary injunction enjoining the defendant, The Providence Journal Company, from refusing to accept the classified advertisements of the plaintiff and from otherwise engaging in acts or practices in violation of 15 U.S.C. § 1, 15 U.S.C. §§ 2, 13 and 18 and 42 U.S.C. § 1985, and various Amendments to the Constitution of the United States. At the conclusion of the hearing on said prayer for a prelminary injunction, I reserved decision pending the filing of memoranda by counsel for the plaintiff and the defendant, The Providence Journal Company.

At the outset of said hearing counsel for the plaintiff stated that the named plaintiff, Keith Walker, is no longer the plaintiff herein, having left Rhode Island, and that Larry Glist of Denver, Colorado and Ronald Phares of Baltimore, Maryland should be substituted as proper parties plaintiff, pursuant to Rule 25(c) of the Federal Rules of Civil Procedure. No formal substitution of parties has been entered in the record of this action.

The evidence adduced during said hearing establishes that on August 1, 1972, the plaintiff and Homefinders of America, Inc., a Colorado corporation with offices in Denver, Colorado, executed an agreement under which said Homefinders of America, Inc. licensed him to use the designation "Homefinders of Providence" and the right to offer listings of available real estate rental properties to the public exclusively in the Counties of Providence and Kent, in the State of Rhode Island. Said agreement was for a period of one (1) year from the date thereof. Said agreement provides that: "Licensee shall upon termination of this agreement, desist from any further use of said trade-name or designation and upon termination of this agreement, the license granted by the Company to Licensee hereunder shall immediately terminate."

The evidence also establishes that on April 28, 1973, the plaintiff, Keith Walker, left Rhode Island and abandoned the license granted to him under said agreement, and his interest therein was promptly terminated by said Homefinders of America, Inc. There is no provision in said agreement authorizing the transfer of said license to any other licensee. Neither is there any provision therein for the reversion of any interest therein to the Licensor. Said agreement carefully avoids placing any post-termination obligation on the licensor, Homefinders of America, Inc. and expressly states that upon termination of said agreement the license created by the agreement "shall immediately cease and terminate."

It is undisputed that Keith Walker, the named plaintiff, no longer has any interest in the business he conducted under said license agreement. Injunctive relief operates prospectively only, and since the injunctive relief sought herein is to protect the business formerly conducted by him in which he no longer has any interest, he clearly has no standing to seek injunctive relief to protect that business. Mendez v. Bowie, 118 F. 2d 435, 439 (1st Cir. 1941), *cert. denied*, 314 U.S. 639 (1941).

As hereinbefore recited, counsel representing the plaintiff at said hearing contended that under the provisions of Rule 25(c) of the Federal Rules of Civil Procedure, this action may proceed in the name of Keith Walker and that injunctive relief may be granted. Rule 25(c) provides in pertinent part as follows:

> (c) *Transfer Of Interest.* In case of any transfer of interest the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. . . ."

It is well settled that said Rule 25(c) governs procedural matters only and does not provide a substantive basis for the standing of Keith Walker or anyone else to seek the preliminary injunction sought in this action. Aluminum Extrusion Company v. Soule Steel Company, 260 F. Supp. 221 n.5 (C.D. Cal. 1966).

Since Keith Walker now has no standing to seek a preliminary injunction, injunctive relief may not be granted unless it appears from the record herein that there is a party before this Court who does have a right to maintain this action as the assignee of said license. As hereinbefore recited, counsel for the named plaintiff contended that Larry Glist and Ronald Phares, officers of said Homefinders of America, Inc., have standing to maintain this action and seek injunctive relief. There was no evidence presented during said hearing of a transfer by Keith Walker of his interest in said license to either of them. Since the said Larry Glist and Ronald Phares have no interest in said business formerly operated by Keith Walker, they have no standing to seek an injunction to protect said business.

In his memorandum filed after said hearing, counsel for the plaintiff abandoned his contention that said Larry Glist and Ronald Phares had standing to seek injunctive relief, and

now contends that said Homefinders of America, Inc. should be substituted as the party plaintiff herein. In my opinion this contention is likewise without merit. There is no provision in said license agreement authorizing the transfer of said license to any other person. Similarly, there is no provision therein for the reversion of said license to said Homefinders of America, Inc. Said agreement carefully avoids the imposition of any post-termination liabilities upon said Homefinders of America, Inc. and expressly states that upon the termination thereof the license created by said agreement "shall immediately cease and terminate."

When said license agreement between Keith Walker and Homefinders of America, Inc. was terminated by the latter, any relationship between the parties thereto ceased to exist as did the license which had been granted to the said Keith Walker.

In my opinion there is no proper plaintiff before this Court in this action. Accordingly, said prayer for preliminary injunctive relief against the defendant, The Providence Journal Company, must be and it is denied.

s/ EDWARD W. DAY
District Judge

Keith WALKER, d/b/a Homefinder's,
Plaintiff, Appellant,

v.

PROVIDENCE JOURNAL COMPANY et al.,
Defendants, Appellees.

No. 73-1308.

United States Court of Appeals,
First Circuit.

Argued Dec. 5, 1973.

Decided Feb. 27, 1974.

Rehearing Denied March 14, 1974.

A franchisee of a housing vacancies information service brought an action against a newspaper publisher in which he claimed that the newspaper had sought to eliminate competitors to its classified advertising section by refusing to deal with him. When the franchisee ceased doing business and left the jurisdiction before a hearing on his prayer for a preliminary injunction, his franchise having been cancelled, the United States District Court for the District of Rhode Island, Edward William Day, J., dismissed the prayer for preliminary relief on the ground that there was no proper plaintiff before the court, and the franchisee appealed. The Court of Appeals, Levin H. Campbell, Circuit Judge, held that the franchisor, although it was not a party to the action, retained sufficient interest in the litigation as the franchisee's successor that dismissal of the action for lack of proper party plaintiff was not warranted, but that the dismissal was nonetheless merited on the basis that no combination or conspiracy in restraint of trade or attempt to monopolize the market for information about housing vacancies had been shown.

Order denying preliminary injunction affirmed.

Ralph J. Gonnella, Providence, R.I., with whom Hodosh, Spinella, Hodosh & Angelone, Providence, R.I., Max D. Stern, Stern & Shapiro, Boston, Mass. and Anthony F. Pennacchia, Providence, R.I., were on brief, for appellant.

Knight Edwards, Providence, R.I., with whom Edward F. Hindle, Jonathan E. Cole, Edwards & Angell, Michael DeFanti, Hinckley, Allen, Salisbury & Parsons, Providence, R.I., Richard J. Israel, Atty. Gen., and Dorothy A. Carr, Special Asst. Atty. Gen., were on briefs, for appellees.

Before COFFIN, Chief Judge, McENTEE and CAMPBELL, Circuit Judges.

LEVIN H. CAMPBELL, Circuit Judge.

Homefinders of America, Inc. (Homefinders), a corporation with a primary place of business in Denver, Colorado, is engaged in the business of licensing or franchising independent businessmen in various states and Canada to use the Homefinders trademark and its distinctive method of providing information about housing vacancies. Keith Walker, the plaintiff, was the franchisee for Rhode Island.

Walker brought suit in the district court on March 5, 1973, alleging that the Providence Journal Co. (Journal), publisher of the only statewide morning and evening newspapers (which held at least two-thirds of all newspaper readership in the state) had violated the antitrust laws, 15 U.S.C. §§ 1 and 2, by attempting to fix the price Walker could charge for his service,[1] by refusing to deal with him, and by attempting to monopolize the market in rental information services by eliminating competitors to the classified advertising section of the papers. Walker sought preliminary and permanent injunctive relief and treble damages. This appeal is from the

[1] The paper allegedly attempted to fix a price of zero by conditioning advertising on Walker's agreement to accept no payment from prospective tenants.

court's denial, after hearing, of a preliminary injunction upon the ground that there was no proper plaintiff before the court. We affirm, but for different reasons.

Walker commenced business in Rhode Island during 1972. Following the Homefinders format he sold for $20 a "policy" entitling its holder to use for a period of one year the services of Homefinders operations throughout the United States. A policy holder was granted access to listings of vacancies classified according to the requirements of different clients; the listings were in catalogues permitting selection by location, price range, landlords' willingness to take children, pets, etc. The office would supply this listing information upon telephoned or personal inquiry.

Walker culled many but not all his listings from classified newspaper ads. In turn Walker advertised his service in newspapers, primarily those of the Journal. Walker and the Journal signed a one-year classified advertising contract, which provided for a number of such ads daily. These ads were alleged to be crucial to the business in two ways: they attracted customers to buy Homefinders' policies, and they attracted owners to list their vacancies with Homefinders.

After Walker began advertising in the papers several agencies[2] received complaints about Walker's service and forwarded them to the Journal. The Journal cancelled the advertising contract, but shortly thereafter reinstated it and the advertising continued until January 31, 1973. On February 1, 1973, the Journal wrote to Walker that it would take no more ads; it simultaneously cancelled the advertising contracts of

[2] These agencies, and their directors, have also been named as defendants. They include the Better Business Bureau, the Rhode Island Consumer's Council, and the Rhode Island State Department of Business Regulations. The Consumers' Council was dismissed by stipulation because it possessed sovereign immunity; a motion to dismiss filed by Edwin P. Palumbo, director of the Council, has been denied.

two other firms in Rhode Island then providing rental listing services for which they charged prospective tenants.[3] The letter of cancellation recited that the new policy was for the benefit of both the Journal and its readers.[4] Attempts to negotiate a new format for the ads proved futile, although Walker allegedly offered to cast the ads in any nondeceptive form acceptable to the Journal and accurately describing the service rendered. Plaintiff claims that the Journal refused such offers.

The hearing on Walker's prayer for preliminary injunction was had on May 10 and 11, 1973. Although his counsel appeared, Walker himself did not attend. Counsel revealed that, approximately two weeks prior to the date of the hearing (although about three months after the Journal had stopped running Walker's ads and two months after the complaint had been filed), Walker had closed his doors and left the state. His franchise with Homefinders had thereupon, under its terms, been cancelled. Counsel stated that the litigation would go forward in the interest of a Mr. Glist, the president and principal stockholder of Homefinders, and of another stockholder. Later during the hearing, through statements of counsel and testimony of Glist himself, it was developed that Homefinders, after discovering Walker's default, had named Charles R. Campbell, the Boston licensee, to operate the

---

[3] One of the other firms changed its form of operation and began to collect a fee from landlords rather than prospective tenants; its advertisements have been reinstated.

[4] There was no specific indication that new complaints about Walker's service had led directly to the cancellation. Plaintiff claimed at oral argument that only five among Rhode Island's approximately 6,000 policyholders are known to Homefinders to have complained. It has been intimated that termination might be related to the criminal prosecution initiated against Walker's alleging that he acted as a real estate broker without a license. A similar prosecution in Maryland was dismissed. *Real Estate Commission v. Phares*, 268 Md. 344, 302 A.2d 1 (1973).

Rhode Island franchise temporarily. Campbell, however, had soon withdrawn, having found the cost of servicing existing policies[5] to exceed any income that could be attracted without newspaper advertising, and having also found that without advertising it was difficult to attract the landlord listings necessary to furnish service to policyholders. Glist testified to Homefinders' continuing desire to operate or license a Rhode Island franchise whenever it became possible to advertise.

At the hearing plaintiff's counsel took the position that Walker was no longer a party. But he insisted that F.R.Civ.P. 25(c) provided for a "substitution" of parties, and that Walker's interest in an injunction had been "transferred" to Homefinders. When the hearing ended it was unclear whether Homefinders or Glist meant to intervene formally.

Twenty days after the hearing, but three months before the district court rendered its decision, plaintiff's counsel filed two affidavits. One was from Walker, then residing with his wife's family in Arizona, asserting his intention to continue as plaintiff and a desire to return to run the Rhode Island franchise, but only if financially able. The other was from Homefinders, stating that it had notified Walker that the Rhode Island franchise rights would be granted to him when and if "the franchise commences to operate again", and stating an intention to retain Walker's attorneys to litigate this case. Homefinders did not, however, move to be substituted or to join as a plaintiff (nor was joinder ordered by the court). In an amended complaint filed with leave in June, 1973, Walker carried on as the sole plaintiff.

The district court on September 6, 1973, dismissed the prayer for preliminary relief against the Journal after an

[5] Walker had not made any refunds to the policyholders before his sudden departure from Rhode Island and may have left other debts. These facts may explain both Campbell's and Homefinders' reluctance to become formally identified either with the Rhode Island franchise or this litigation.

opinion which ended with the somewhat enigmatic statement that there is "no proper plaintiff before the court in this action." Although that ground, standing alone, might suggest that the entire action should be dismissed, the ruling related solely to Walker's standing to seek a preliminary injunction. There is no indication that the court meant to foreclose Walker's claim for damages or even, to the extent different facts might later be developed, his prayer for a permanent injunction. And because a more complete picture may yet be developed, our own present opinion, relating solely to the record as it now stands, should not be read to preclude the district court from reaching other conclusions concerning the interests and intentions of Walker (and Homefinders) should an expanded record warrant them.

But for present purposes, and on the existing record, we disagree with the district court's conclusion, as we understand it, that preliminary relief had to be denied for want of a showing that there was a proper plaintiff. Although we think there are other reasons to deny preliminary relief, it should not have been denied on the ground stated.

[1] An antitrust defendant does not necessarily avoid injunctive relief because it succeeds in driving a proper plaintiff out of business before the court has time to rule on a request for an injunction. Even though he is not currently conducting business in the market allegedly encumbered with the illegal conduct, an aggrieved party may retain a sufficient interest to seek and obtain injunctive relief against a violation of the antitrust laws. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969), on remand 418 F.2d 21 (7th Cir. 1970), rev'd on other grounds 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971). He "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Id.* at 130, 89 S.Ct.

at 1580. In Bus Employees v. Missouri, 374 U.S. 74, 78 (1963), it was held that even though the acts complained of no longer had a direct injurious effect, plaintiff could still seek an injunction where the dispute remained unresolved[6] and there was "not merely the speculative possibility of ... some future ... dispute, but the presence of an existing unresolved dispute...."

It is true that the genuineness of Walker's desire to return to the market from which the Journal's conduct allegedly drove him is questionable. As for Walker, the alleged injury may be complete rather than continuing, thus rendering a preliminary injunction inappropriate as to him. While Walker asserted by affidavit a qualified intention to return to Rhode Island, we cannot say the district court was found to believe him.

[2,3] Homefinders, however, remains subject to current injury from the alleged antitrust violation. As a transferee of Walker's interest in the Rhode Island market, its position undergirds Walker's. *See* F.R.Civ.P. 25(c). When the original complaint was filed Walker was still transacting business;

[6] Our case of Mendez v. Bowie, 118 F.2d 435 (1st Cir.), cert. denied sub nom. Rios v. Bowie, 314 U.S. 639, 62 S.Ct. 76, 86 L.Ed. 513 (1941), is not to the contrary. Plaintiff sought an injunction against and damages for trespass to land, but sold the land after commencement of the suit. We held that the action for damages, but not for an injunction, survived the sale. However, plaintiff in *Mendez* sold his entire interest in the land; Walker and Homefinders filed affidavits indicating at least a conditional desire by Walker to resume the Rhode Island franchise and Homefinders' willingness that he do so. Moreover, plaintiff's sale did not deprive the buyer of standing to seek an injunction; we pointed out that it was "apparent ... that the purchaser of [the land] does not wish to become involved in this litigation...." Homefinders, by way of contrast, does want to participate and actively supports the relief sought. Homefinders and, more marginally, Walker have a continuing interest in the injunctive claim, whereas only the buyer had such an interest in *Mendez*.

although during the pendency of the action the Walker franchise "terminated" and was not "assigned" to Homefinders, Homefinders, as franchisor, automatically reacquired the rights it had ceded to Walker. It came again to possess the right to place or operate a franchise in Rhode Island. Homefinders, furthermore, was obligated, through its remaining franchisees, to service the policies. When the agreement was terminated, Walker was required to turn all his books and records over to Homefinders and Homefinders was entitled to use a $20,000 reserve fund, established by the agreement, to service Walker's policies, and to charge Walker for any additional sums expended in so doing.[7] Finally, once Homefinders succeeded to the right to conduct or relicense the Homefinders operation in Rhode Island, it also found itself saddled with the same burden borne by Walker—the inability to advertise the business in the Journal.[8]

[4] Rule 25(c) provides that in case of any transfer of interest the action may be continued by the original party unless the court upon motion directs substitution or joinder. Homefinders should have moved for joinder, but its mere failure to do so was not fatal. *See* 3B Moore's Federal Practice ¶ 25.08. Homefinders has made known its interest in carrying forward the litigation. We would feel differently had

[7] The fact that Homefinders has, instead of using these options, left the policyholders to shift for themselves without either service or refunds might militate against the grant of equitable relief, but it would not undermine Homefinders' standing to seek it.

[8] Homefinders' desire to enter the market is not so "speculative" that injunctive relief becomes inappropriate. Homefinders, through its franchisee, has already been a participant in the market and is therefore even more closely connected to it than was the plaintiff in *Zenith*, *supra*. Cases cited by the Journal such as Holiday Inns of America, Inc. v. B & B Corp., 409 F.2d 614 (3d Cir. 1969), are inapposite; they are trademark cases rather than antitrust, and involve plaintiffs with no past or current connection with the subject market. *See Id.*, at 618 n.13.

the district court on reasonable terms ordered Homefinders to join, and had Homefinders declined.[9] The court could have forced Homefinders either to join or forfeit any further claim of interest in the litigation. But it did not do so and, under Rule 25(c), Homefinders must be counted in determining whether there is a "proper plaintiff before the court."

Walker and Homefinders together possess the totality of rights, duties and expectations concerning the operation of a Homefinders business in Rhode Island. These present interests, combined with the alleged past injuries, provided adequate standing to seek the issuance of injunctive relief should it otherwise have been appropriate.

[5] While there was thus a showing of standing and interest sufficient to seek a preliminary injunction against the alleged antitrust violations, it does not follow that the district court erred in withholding relief, nor that we should direct that an injunction be entered. A plaintiff urging us to adopt such a course, notwithstanding the district court's failure to reach its legal claims, has to show that, on the record as developed in the district court, it is virtually certain to prevail. Automatic Radio Mfg. Co. v. Ford Motor Co., 390 F.2d 113 (1st Cir.), cert. denied 391 U.S. 914, 88 S.Ct. 1807, 20 L.Ed.2d 653 (1968). It has not made such a showing.

[6,7] Plaintiffs urge that the Journal has violated both §§ 1 and 2 of the Sherman Act. The § 1 claim fails because the record in this case does not disclose the presence of a "combination or conspiracy"; it appears, instead, that the Journal has acted on its own. Since a corporation cannot conspire with its own employees, Joseph E. Seagram & Sons, Inc. v. Hawaiian

[9] Under Rule 21 the court on its own initiative could have ordered the joinder of Homefinders. It should do so. Homefinders ought not to be permitted to occupy its present ambiguous role as a kind of nonlitigant litigant. 3A Moore's Federal Practice ¶¶ 21.04 [1] & [2]; Hackner v. Guaranty Trust Co., 117 F.2d 95 (2d Cir.), cert. denied 313 U.S. 559, 61 S.Ct. 835, 85 L.Ed. 1520 (1941).

Oke & Liquors, Ltd., 416 F.2d 71, 82-84 (9th Cir. 1969), cert. denied 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970), plaintiff must search elsewhere for a plurality of actors pursuing a "joint [and] collaborative" policy. United States v. General Motors Corp., 384 U.S. 127, 145, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966). The only other named defendants in this case have, so far as the record discloses, done no more than forward to the Journal complaints about Walker's service. They have not embarked with the Journal upon a joint course of conduct. Nor is Walker helped by his imaginative theory that the Journal collaborated with Walker because, when the Journal refused to accept Walker's ads, Walker ceased advertising. Although the conspiracy requirement of § 1 may have faded enough over the years to include even conspiracies with unwilling coconspirators, *see* Albrecht v. The Herald Co., 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968), and conspiracies with customers, United States v. Parke, Davis & Co., 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960), the doctrine is not yet so chimerical that the *refusal* of one party to deal or agree further with another can be construed as an agreement.

[8] This leaves only the § 2 theory that the Journal was attempting to monopolize the Rhode Island market in "informational services." This market presumably refers to the market for information about housing vacancies; we say presumably because plaintiffs have made no attempt to define the market, and have made no proof that the Journal has anything approaching a monopoly in it. Such careful definitions and proof are indispensable in antitrust actions. It may be that, utilizing the theory of United States v. Otter Tail Power Co., 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), plaintiffs will be able to demonstrate that the Journal

has used an alleged monopoly in the newspaper or advertising markets to attempt to establish a monopoly in the market for vacancy information. *Cf.* Lorain Journal Co. v. United States, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951). But we cannot say that plaintiff demonstrated on the record before the district court such a likelihood of success on the merits as would have required the issuance of a preliminary injunction.

Order denying preliminary injunction affirmed.

HOMEFINDER'S OF AMERICA, INC. and Keith Walker, d/b/a Homefinder's, Plaintiffs,

v.

PROVIDENCE JOURNAL COMPANY et al., Defendants.

Civ. A. No. 5133.

United States District Court,
D. Rhode Island.

June 8, 1979.

Rental referral firm brought suit against newspaper company and others, alleging that the newspaper's refusal to accept the firm's advertising violated antitrust laws and seeking damages and equitable relief. The District Court, Francis J. Boyle, J., held that: (1) the newspaper's action in rejecting plaintiff's advertising and in establishing a policy not to accept advertising from rental referral firms which charged fees to prospective tenants was not a combination in restraint of trade in violation of the Sherman Act; (2) the actions of the newspaper fell squarely within the rule that, in absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict a business person's right to exercise discretion as to parties with whom he will deal; (3) plaintiff failed to establish the element of joint action required by the Sherman Act; (4) the alleged combination did not in fact unreasonably restrain trade, and (5) the evidence did not support plaintiff's contention that the newspaper had monopoly power over the renter information market.

Complaint denied and dismissed.

OPINION AND ORDER

FRANCIS J. BOYLE, District Judge.

This is an action in which Plaintiff, Homefinder's of America, Inc., seeks damages and mandatory equitable relief against Defendant Providence Journal Company, its Director of Advertising, George Bellano, and so-called nominal Defendants John Doe and Jane Roe, described as customers of Plaintiff and Defendant Providence Journal Company whose present identities are unknown. Plaintiff's Complaint is based upon Sections 1 and 2 of the Sherman Anti-Trust Act of 1890, 15 U.S.C. §§ 1 and 2. The action was heard on a second Amended Complaint on its merits following denial of a preliminary injunction. *Walker v. Providence Journal Company*, 493 F.2d 82 (1st Cir. 1974).[1]

There is a total absence of evidence aimed at implicating the individual Defendants and in accord with Plaintiff's concession at oral argument as to the individual Defendants, judgment will enter in their favor for costs.

The basis of this action is the refusal of Defendant, Providence Journal Company, hereafter Defendant, to accept Plaintiff's advertising for publication in its newspapers concerning available rental housing vacancies, and the adoption by Defendant of a policy declining to accept any advertising for publication where a fee is required of prospective tenants in order to obtain rental information.

Plaintiff in substance contends a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, by reason of the acquiescence of two firms, other than Plaintiff, who furnished rental information for a fee, in the policy of Defendant to refuse to publish advertisements, as a *per se* violation or a vio-

---

[1] Plaintiff Keith Walker's action has been dismissed for failure to respond to discovery requests.

lation of the "rule of reason."[2] Additionally, Plaintiff alleges violations of Section 2 of the Sherman Act, 15 U.S.C. § 2, claiming that Defendant monopolizes and, also, attempts to monopolize the renter information service market by means of its strategic dominance over the daily newspaper market in the relevant geographic area.

In addition to testimony presented at an extended hearing, the Court has also considered as evidence testimony submitted in connection with a hearing on Plaintiff's prayer for preliminary injunction on May 10 and 11, 1973 and portions of depositions designated by counsel. The Court makes the following findings of facts and conclusions of law:

Plaintiff is a Colorado corporation created in 1971. In 1976, its name was changed to Pacific-Atlantic Development Co., Inc. Initially, it operated a rental information service at Denver, Colorado. It collected information concerning available rental properties, listed the information and sold the information to prospective tenants for a fee. Landlords were permitted to list their properties without charge. Prospective tenants purchased a contract or policy from Plaintiff—valid for a year. The information collected by Plaintiff was then made available to the prospective tenant. Plaintiff later sold its operating business and has not itself directly participated in that business since that time. Rather, Plaintiff began the business of franchising its method of doing business. It succeeded in contracting with franchisees throughout the United States, in parts of Canada, and Australia. In general, Plaintiff provided its franchisees with instructions in its method of providing renter information and provided assistance in the

[2] Plaintiff has additionally moved to amend the second Amended Complaint to add as co-conspirators two individuals, the Board of Realtors, the customers of Plaintiff, the customers of Defendant, and real estate brokers who comply with Defendant's policy. Additionally, five Defendants were eliminated as Defendants by amendment.

actual operation of the franchise, including accounting services and advertising advice for a percentage of the franchisee's gross income.

On August 1, 1972, Plaintiff entered into a franchise agreement with one Keith Walker, who was then an employee of another franchisee, whereby Walker was granted an exclusive license to offer listings of available real estate limited to Providence and Kent Counties in the State of Rhode Island. The agreement was terminable by either party upon 30 days written notice and upon termination the franchisee was required to immediately transfer to Plaintiff all outstanding and current listings, customer records, documents, books of account and all other records relating to the operation of the franchise, and all mail. Upon termination, the franchisee was required to furnish services to customers for a period of one year. Upon the franchisee's failure to continue to provide services for a period of one year, the Plaintiff was authorized to expend a reserve account of up to $20,000 to honor franchisee's commitments. The reserve account was created by a charge of 5% on gross sales until the reserve account, retained by Plaintiff, amounted to $20,000.

Plaintiff at the time of trial was not engaged in any rental information service anywhere. It now operates a check cashing service in Denver, Colorado. The reason assigned for its withdrawal from the rental information business was a Federal Trade Commission Consent Order which Plaintiff found difficult to supervise and which, it was testified, could have subjected Plaintiff and its officers to personal liability. *In the Matter of Rentex, Inc. T/A Homefinders of America, etc., et al.*, 87 F.T.C. 1340 (May 25, 1976).

Although Plaintiff now asserts that, if it is successful, it will revive its business at Providence, Rhode Island, this assertion is contrary to Plaintiff's explanation of the purpose of this litigation stated in its weekly newsletter to dealers published shortly after this litigation was commenced. It stated:

THE LAWSUIT IN PROVIDENCE:

The situation in Providence is as follows. First of all, our attorney, Mr. Tony Pennacchia, has suggested that since Mr. Walker has left we should not reopen the Providence office and that we should not service the accounts in the Providence area. I am sure this seems a great deviation from our normal policy; however, Mr. Pennacchia's reasoning is that there will be a certain amount of consumer protest due to the fact that no dealer is in Providence to service the local accounts. Our firm in the lawsuit and litigation against the Providence Journal will seize upon this situation to blame the newspapers for, in fact, our inability to service these accounts. In other words, we are alleging in our lawsuit that not only has the company suffered irreparable harm by the newspaper's actions and not only has Mr. Walker suffered irreparable harm from the newspaper, i.e. he went out of business, but also the consumers in the Providence area who have contracted with us for our services are also individually and collectively suffering damages which will be laid to blame directly upon the action of the newspaper's refusing to run our advertising. We feel that by blaming the newspaper for this action this tends to strengthen our position that the newspaper is a monopoly and a defacto public utility who can create great harm and damage upon not only a firm and its employees per se, but also a community at large. Consequently, at this time we will not replace the dealer in Providence and the Providence accounts will go unserviced. This should not cause great hearm (sic) to our reputation since, as you know, each of you will soon be changing to the use of Rentex and whereas it is contrary to our normal code of ethics of operation, I believe Mr. Pennacchia's point is well taken and this action could ultimately serve to benefit the company and possibly the consumer.

The Court cannot accept as fact Plaintiff's assertion that, if successful in this action, it will revive its renter information service in the Providence area. In addition to the fact that the F.T.C. order of May 25, 1976 will severely curtail Plaintiff's modus operandi, it appears that it is now engaged in only two businesses, check cashing and this litigation. Its representations concerning future operation are not credible.

Plaintiff seeks damages for Defendant's past refusal to accept its advertising and seeks to compel Defendant to accept its advertising in the future. Plaintiff cloaks its demands under the provisions of an Act of Congress adopted in 1890, which sought to prevent combinations or intentional action designed to eliminate or limit freedom of economic opportunity. This legislation recognized the need to insure conditions of free competition in a society constitutionally endowed with a considerable degree of opportunity of choice. It is Plaintiff's argument that while it may advertise as it chooses, Defendant lacks the choice of declining to print that which Plaintiff wishes to publish. Plaintiff would have this Court ignore the probable effect of Defendant's publication of Plaintiff's advertisements. In mildest terms, the nature of Plaintiff's advertising is misleading. It sought to notify the public, not of the qualities and virtues of its service, but of the alleged availability of particular properties. At first blush, this seems to be inconsistent with Plaintiff's own interest, since the commodity which it had for sale was information concerning the availability of certain properties which would be disclosed only upon the payment to Plaintiff of its fee. In fact, the purpose of this advertising eminently served Plaintiff's purpose. It inserted advertisements which were calculated to attract an unusual degree of attention, indicating that properties were available for rent under circumstances that were, to say the least, unusual. For example, its advertisements stated that children and pets were welcome, utilities were paid and auto-

mobile parking was available. Complaints concerning this type of advertising establish without doubt that it is what has been called "bait" advertising. When the prospective tenant called the listed telephone number, it turned out to be Plaintiff's telephone and the exuberant prospective tenant was told that the property advertised was no longer available but if the prospective tenant would merely come to Homefinder's Office and pay the fee of $20, other listings would be made available. In some instances, it is admitted, properties were advertised by Plaintiff without the knowledge or consent of the owner, and in terms quite different from those which the owner had in mind.

Plaintiff in oral argument contends that the purpose of this type of advertising was to notify the public that it had listings of properties in particular areas. This explanation cannot be accepted. It is clear that Plaintiff's admittedly deliberate misrepresentation was solely for the purpose of entrapping desperate people seeking a place to live by enticing them as customers through false, unauthorized and misleading advertisements. Contrary to Plaintiff's pious protestations of principles necessary to free competition, Plaintiff would require Defendant to become an unwilling co-conspirator to mislead the customers of Defendant Providence Journal Company.

[1] Plaintiff first argues that Defendant Providence Journal Company violated § 1 of the Sherman Act, 15 U.S.C. § 1. Section 1 provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

In order for Plaintiff to succeed on this theory, it must necessarily establish that the Defendant Journal either combined or conspired in restraint of trade within the meaning of the Act. The record indicates however, and this Court finds

as a matter of law, that the Journal's action in rejecting Plaintiff's advertising and establishing its policy not to accept advertising from any rental referral firm who charged a fee to the prospective tenant does not violate § 1 of the Sherman Act.

[2] The purpose and policy of the Act is to preserve competition by eliminating conduct whose purpose or effect was to restrain or obstruct the course of trade.

> [I]n the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.

United States v. Colgate & Co., 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919).

[3, 4] The announcement of policy and simple refusal to deal, without more, is not barred by § 1. Section 1 bars concerted activity in the form of a combination or conspiracy to effectuate a policy in restraint of trade. Plaintiff alleges that the co-conspirators with Defendant Journal were the two firms who like Plaintiff charged a fee to tenants, the Board of Realtors, real estate brokers who complied with Defendant's policy, as well as the customers of both Plaintiff and Defendant. In substance, Plaintiff argues that their acquiescence in Defendant's policy, be it voluntary or involuntary, satisfies the collaboration requirement of § 1. The Court holds that it does not.

[5, 6] The facts establish that Defendant's actions were unilateral and fall squarely within the *Colgate* doctrine, as limited by later Supreme Court decisions. *See: Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80

S.Ct. 503, 4 L.Ed.2d 505 (1960); *Federal Trade Comm. v. Beech-Nut Packing Co.*, 257 U.S. 441, 42 S.Ct. 150, 66 L.Ed. 307 (1921). Defendant instituted a new policy and communicated it clearly to its readers and customers by means of a printed announcement in its advertising section. It then proceeded to adhere to its new policy as announced, but it employed no coercive or threatening means or other affirmative action prohibited by § 1 in order to secure compliance with its policy. The Court does not accept Plaintiff's argument that Defendant, by inviting readers to call if they were charged a fee, was utilizing a reporting system which constituted prohibited affirmative action. This Court must determine whether an unlawful combination is proved by judging what the parties actually did, rather than by the words they used. *United States v. Parke, Davis & Co.*, 362 U.S. at 44, 80 S.Ct. 503. Defendant Journal's conduct does not resemble the elaborate enforcement schemes which the Supreme Court found to be illegal combinations in both *Albrecht* and *Parke, Davis*.

[7, 8] Furthermore, "[i]t is not sufficient to merely allege acquiescence and thus claim a combination has been demonstrated." *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256 (5th Cir. 1978) at 289. The Court must scrutinize the totality of circumstances which induced the alleged acquiescence after a simple policy announcement. Where the customer acquiescence was "based solely on the individual self-interest of the customer in continued dealings" with the Defendant, such acquiescence is not an agreement within the reach of the Sherman Act.

> This is true even though it is recognized that there is no difference in economic effect between adherence to a manufacturer's policy effected by prohibited agreement and adherence effected by conduct within the narrow safety zone offered by *Colgate*.

Ford Motor Company v. Webster's Auto Sales, Inc., 361 F.2d 874, 879 (1st Cir. 1966); *United States v. Parke, Davis & Co.*, 362 U.S. at 44, 80 S.Ct. 503. Plaintiff fails to establish the element of joint action and thus fails to sustain its § 1 claim.

[9] If Defendant Journal's conduct were viewed as satisfying the § 1 combination conspiracy requirement, which this Court expressly finds unsatisfied, Plaintiff fails to prove that the alleged combination does in fact unreasonably restrain trade. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918). Plaintiff's argument that Defendant's conduct should be regarded as illegal *per se* is without merit. The application of the *per se* rule which does not take into account the market power of the parties, the purpose of the restraint, or the legitimate business reasons for the practice, is limited to those practices which have a "pernicious effect on competition" which lack "any redeeming virtue." *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 4, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

[10] Applying the more flexible Rule of Reason recently embraced anew by the Supreme Court in *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), a wide variety of factors are to be considered in order to determine legality. The inquiry must focus on a consideration of the impact on competitive conditions. *Standard Oil v. United States, supra*, 221 U.S. at 65, 31 S.Ct. 502. There is a total lack of evidence which remotely suggests the slightest impact on competitive conditions. The Plaintiff's contention that Defendant Journal's classified advertising is the only method of communicating with prospective tenants is patently absurd if what Plaintiff has in mind is attracting customers by so-called "tombstone advertising"; that is, advertising which proclaims the alleged virtues of Plaintiff's

service as opposed to advertising which relates to particular properties. Plaintiff ignores not only other methods of communication, radio, television, billboard, weekly newspapers, so-called shoppers' guides and throw aways, but has avoided totally any references to other sources of renter information such as real estate agents and indeed "For Rent" signs perched in vacant tenement windows.

Plaintiff's argument starts with the conclusion that classified advertising concerning the availability of potential rental properties is imperative to Plaintiff's success and then argues that in view of the extensive circulation of Defendant Journal's classified advertising, it must be considered to be a monopoly. This intellectual "bootstrapping" would enlarge the scope of Section 1 to the point where no businessman could refuse to deal.

Under the Rule of Reason analysis, the purpose of the arrangement is a serious consideration.

> The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse, but because knowledge of intent may help the court to interpret facts and to predict consequences.

Chicago Bd. of Trade v. United States, supra, 246 U.S. at 238, 38 S.Ct. at 244.

[11] The evidence in the record clearly shows and this Court finds that the Defendant's decision to reject Plaintiff's advertising and to institute its policy not to accept ads from fee-charging firms was not in any way intended to restrain trade or enhance Defendant's own position in the rental information market. Indeed, there is no evidence that Defendant's policy did anything other than reduce its advertising revenues. Rather, it was sound business judgment made at a financial sacrifice, intended to maintain a quality advertising

section for its readers. After receiving complaints from readers as to the quality of service Homefinder's was providing, and recognizing the obvious potential for abuse in other such firms, Defendant made a legitimate consumer-oriented decision to stop dealing with fee-charging firms.

[12] In substance, Defendant was primarily motivated by its legitimate concern that the ads it was publishing were injurious to the public in that they constituted a form of deceptive advertising. In view of the fact that unfair or deceptive acts or practices in commerce are unlawful under 15 U.S.C. § 45, it was certainly good business and ethical judgment for Defendant, believing Homefinder's ads to be deceptive, to discontinue its dealing with it. Plaintiff here is alleging serious anti-trust violations, yet the very foundation upon which those alleged violations rest was Defendant's refusal to participate in a potentially unlawful operation.[3] 15 U.S.C. § 45, although found in a different chapter than 15 U.S.C. § 1 and § 2, was designed to supplement and bolster the Sherman Act. Its very purpose was to eliminate unfair competition and practice which if left untouched would inevitably become the evils prohibited by the Sherman Act. *F. T. C. v. Motion Picture Adv. Co.*, 344 U.S. 392, 73 S.Ct. 361, 97 L.Ed. 426 (1953); *Fed. Trade Comm. v. Raladam Co.*, 283 U.S. 643, 51 S.Ct. 587, 75 L.Ed. 1324 (1931); *Butterick Pub. Co. v. Federal Trade Commission*, 85 F.2d 522 (2d Cir. 1936.)

Section 2 of the Sherman Act, 15 U.S.C. § 2, compliments the prohibition of combinations to monopolize forbidden by § 1 of the Sherman Act. Its thrust includes the prevention of unilateral action to attempt to obtain monopoly power or the actual aquisition of monopoly power. It is essential to this

[3] Plaintiff's suggestion that Defendant can edit untruthful copy or refer complaints to the proper regulatory authority, including the Federal Trade Commission, seeks to shift a burden to Defendant without justification.

aspect that a determination is made concerning what product and what market is at issue.[4]

In *Walker v. Providence Journal Company, supra,* the Court of Appeals stated that plaintiff had not demonstrated on the record, at that time, such a likelihood of success on the merits of its Section 2 claim that would have required the issuance of a preliminary injunction. In its opinion the Court of Appeals, in part, stated:

> This market presumably refers to the market for information about housing vacancies; we say presumably because plaintiffs have made no attempt to define the market, and have made no proof that the Journal has anything approaching a monopoly in it. Such careful definitions and proof are indispensable in antitrust actions.

Walker v. Providence Journal Company, supra, at 87. After a plenary trial, the circumstances remain the same.

Plaintiff's evidence is directed solely to the market for classified advertising in newspapers of individual properties for rent. In its effort to establish the product, Plaintiff has established that it supplies information to its customers concerning particular available rental properties. This is a service and is similar to the service which the Defendant provides to its readers in the classified section of its newspapers. As a consumer may obtain the information in the possession of Defendant concerning vacancies by purchasing its newpapers, a consumer can obtain the information in the possession of Plaintiff by paying it a fee.

---

[4] Plaintiff's Pre-Trial Memorandum, P. 57, note 52 contends that this is an instance of use of monopoly power and therefore "a product and geographic market definition is not needed for the market upon which the restraint is being imposed," citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) note 59. Nothing in note 59 supports this contention or even remotely suggests it.

In spite of the observation of the Court of Appeals in this action that relevant market must be carefully defined and proof is indispensable, it is far from crystal clear exactly what the Plaintiff contends. Perhaps the best statement of its most recent contention is found in its proposed findings of fact, as follows:

> 28. The relevant geographic market for purposes of Plaintiff's Section II (sic) claim, is the Providence—Pawtucket—Warwick, Standard Metropolitan Statistical Area (P.P.W.—S.M.S.A.) A relevant geographic sub market is the Providence City Zone as designated by the Audit Bureau Circulation Reports.
>
> 29. The relevant product market for purposes of plaintiff's Section II (sic) claims are:
>
> a) Daily newspaper readership.
>
> b) Daily newspaper advertising.
>
> These markets are interdependent and comprise the daily newspaper market.
>
> 30. Daily newspapers are a distinct and separate product market from all other forms of advertising media.

Plaintiff contends that because of Defendant's policy, it is denied access to the relevant daily newspaper advertising market, and that Defendant possesses this power of elimination due to its "... 'strategic dominance' over the daily newspaper market and that it possesses monopoly power in the daily newspaper market in the relevant geographic areas." (Reply Memorandum of Plaintiff, Page 6).

Plaintiff contends both a vertical and a horizontal effect of the Defendant's policy, i.e. horizontal in the sense that the effect of the policy is to preserve the Defendant's position as a distributor of rental information from competition, and vertical in the sense that all rental referral firms are eliminated from the marketplace.

Plaintiff argues three theories "of monopolization":

(1) Unlawful use of monopoly power in readership to foreclose competition in the marketplace;

(2) Bottleneck analysis; and,

(3) Unlawful use of monopoly power in advertising to foreclose competition in the marketplace.

Plaintiff argues as its first theory that Defendant has used its monopoly power in readership to foreclose competition in the marketplace, citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *United States v. Griffith*, 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236 (1948); and *Gamco Inc. v. Providence Fruit & Produce Building*, 194 F.2d 484 (1st Cir. 1952).

Plaintiff argues as its second theory that the denial of access to a "scarce facility" necessary for competition is a violation of Section 2 as the creation of a bottleneck impeding the free flow of commerce.

The third string to Plaintiff's argumentative bow is the contention that Defendant's use of monopoly power in advertising denies competitors a marketplace.

Additionally, Plaintiff argues an "attempt to monopolize" by eliminating all rental referral firms from competition with Defendant's marketing system.

Lastly, Plaintiff argues that the only justification defense available to Defendant is that "physical limitations" compel Defendant to choose between competitors.

The breadth and sweep of Plaintiff's arguments have a tendency to produce a breathless state of mind which requires a step backward to place this controversy in manageable perspective. Put in less complex and more easily understood terms, the Plaintiff argues that Defendant has a duty to publish Plaintiff's advertisements, irrespective of content, in order that Plaintiff may operate its business at the least ex-

pense and with the greatest possible gain. Otherwise Defendant is guilty of what Plaintiff calls "monopoly action."

Plaintiff does not argue "that the Defendant Providence Journal Company unlawfully acquired monopoly power in the daily newspaper market. On the contrary, the more likely conclusion is that the Defendant is 'a natural monopoly in the relevant market.' "

[13] The test of violation of Section 2 of the Sherman Act is two-fold: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or a historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). *See also: Kansas City Star Company v. United States*, 240 F.2d 643, 660 (8th Cir. 1957); *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582 (1st Cir. 1960); *Cole v. Hughes Tool Company*, 215 F.2d 924 (10th Cir. 1954). Twenty-five years ago, the Supreme Court pointed out that at that time only eight percent of daily newspaper cities enjoyed the clash of opinion which competition among publishers of the daily press could provide and that "... daily newspaper competition within individual cities has grown nearly extinct." *Times-Picayune v. United States*, 345 U.S. 594, 603, 73 S.Ct. 872, 877, 878, 97 L.Ed. 1277 (1953).

It is the nature of the business that the dominant cause of newspaper monopoly is "efficiencies of large circulation size." *Monopoly in the Daily Newspaper Industry*, 61 Yale L.J. 948, 1005 (1952). Further, the local reader who has an interest in local events will not have that interest satisfied by an out-of-town newspaper. The circulation statistics introduced by Plaintiff fully support these observations.

In those communities, Pawtucket-Central Falls, and Woonsocket, Rhode Island, and Attleboro, Massachusetts, communities located in the Providence-Pawtucket-Warwick

S.M.S.A., and in which local daily newspapers are published, the Defendant is at a competitive disadvantage. This is also true with respect to some communities adjacent to Pawtucket-Central Falls, Woonsocket and Attleboro, e.g. Lincoln, Burrillville, Cumberland, North Smithfield, Rhode Island, and North Attleboro, Norton, Plainville, Blackstone and Millville, Massachusetts. The circulation advantage of the Defendant has the appearance of what one of Plaintiff's witnesses characterized, in another context, as a "swiss cheese" effect. In all of the other communities located in the Providence-Pawtucket-Warwick, S.M.S.A., Defendant has a circulation advantage with an advantage of 152,379 to 5846 in the Providence City Zone so-called, consisting of the communities of Providence, Cranston, East Providence, North Providence, Johnston, Barrington, Bristol, Warren, Warwick, West Warwick and East Greenwich, Rhode Island. Furthermore, by limiting the geographic area to the Providence-Pawtucket-Warwick S.M.S.A., or as a submarket, the Providence City Zone, so-called, the Plaintiff has eliminated the competitive effect of the two daily newspapers published in the southern part of the State of Rhode Island, in the communities of Newport and Westerly. This omission is significant in that although editions of Defendant's newspaper are specially published for those areas, and the Defendant's daily newspapers are sold there, it is at a distinct competitive disadvantage. The same observations can be made concerning the Fall River, Massachusetts area.

[14] It is only in the so-called Providence City Zone that it can be said that Defendant has "strategic dominance" of the daily newspaper market. This is a geographic area with the City of Providence at its center and adjacent communities in a rough semi-circle extending from East Providence on the east, southerly along both sides of Narragansett Bay and westerly and northerly to North Providence, all within the

State of Rhode Island, and constituting only a portion of the Providence—Pawtucket—Warwick S.M.S.A. However, there is no evidence to support in any fashion the contention that this area is an existing submarket for renter information.

Furthermore, there is no evidence that Defendant maintains monopoly power. There is no evidence to establish the basic premise of Plaintiff's contention upon this branch of the argument, i.e., that Plaintiff controls the renter information market. As previously stated, other methods of obtaining information concerning rentals were ignored by Plaintiff, but this Court may not be so oblivious to the economic facts of life. It is a fact that Defendant sells more newspapers than other newspapers published in certain areas of the State of Rhode Island. This fact is a considerable step away from the bald unsupported conclusion asserted by Plaintiff that, therefore, it possesses monopoly power with respect to renter information.

Plaintiff's Complaint is denied and dismissed. Judgment will enter for Defendant Providence Journal Company for costs.

SO ORDERED.

HOMEFINDERS OF AMERICA, INC.,
Plaintiff, Appellant,

v.

PROVIDENCE JOURNAL COMPANY et al.,
Defendants, Appellees.

No. 79-1396.

United States Court of Appeals,
First Circuit.

Argued Feb. 6, 1980.

Decided March 26, 1980.

As Amended on Motion for Correction or
Modification of Opinion April 22, 1980.

Franchisee whose business consisted of selling listings of properties available for rent brought antitrust action against newspaper. The franchisor was joined as plaintiff and the United States District Court for the District of Rhode Island, Francis J. Boyle, J., 471 F.Supp. 416, dismissed. The Court of Appeals, Aldrich, Senior Circuit Judge, held that the newspaper did not violate the Sherman Act when it refused to run admittedly deceptive classified advertisements submitted by the franchisee.

Affirmed.

Ralph J. Gonnella, Providence, R.I., for plaintiff, appellant.

Joseph V. Cavanagh, Jr., with whom Knight Edwards, John D. Deacon, Jr. and Edwards & Angell, Providence, R.I., were on brief, for defendants, appellees.

Before ALDRICH and BOWNES, Circuit Judges, KEETON, District Judge.*

---

* Sitting by designation.

ALDRICH, Senior Circuit Judge.

This is an action under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, brought initially by one Walker, a franchisee of Homefinders of America, Inc., against Providence Journal Co., publisher of a daily metropolitan newspaper. Homefinders later was joined as plaintiff, *see Walker v. Providence Journal Co.*, 1 Cir., 1974, 493 F.2d 82, and is now the sole plaintiff remaining. Plaintiff alleges that on and after February 1, 1973, defendant unlawfully refused to run classified advertisements desired by Walker, causing him financial loss and ultimately to go out of business and preventing plaintiff from re-establishing a Rhode Island franchise. The case was tried to the court. After extensive findings the court dismissed the action. *Homefinders of America, Inc. v. Providence Journal Co.*, D.R.I., 1979, 471 F.Supp. 416. We affirm.

Walker's business consisted of selling to individual customers, for an advance fee, listings of properties available for rent in his area, and in any requested areas where plaintiff had other franchises. Plaintiff agreed to furnish such listings and to provide Walker with assistance, information, and advice in return for a percentage of his gross receipts. Walker's own lists were comprised of properties listed with him by prospective landlords, plus others of which more will be said later. No fee was charged to the landlords. Walker did not participate in any rental negotiations, nor did he receive any commissions; his sole activity was the sale and maintenance of lists. His advertisements, however, were ostensibly of individual but insufficiently identified properties, seemingly no different from the usual classified advertisement relating only to the property mentioned. A reader responding to Walker's advertisement was apt to learn, however, that the property was not available, and, in any event, that he would have to pay a fee for further information. The court found,

"In mildest terms, the nature of Plaintiff's advertising is misleading. It sought to notify the public, not of the qualities and virtues of its service, but of the alleged availability of particular properties. At first blush, this seems to be inconsistent with Plaintiff's own interest, since the commodity which it had for sale was information concerning the availability of certain properties which would be disclosed only upon the payment to Plaintiff of its fee. In fact, the purpose of this advertising eminently served Plaintiff's purpose. It inserted advertisements which were calculated to attract an unusual degree of attention, indicating that properties were available for rent under circumstances that were, to say the least, unusual. For example, its advertisements stated that children and pets were welcome, utilities were paid and automobile parking was available. Complaints concerning this type of advertising establish without doubt that it is what has been called 'bait' advertising. When the prospective tenant called the listed telephone number, it turned out to be Plaintiff's telephone and the exuberant prospective tenant was told that the property advertised was no longer available but if the prospective tenant would merely come to Homefinder's Office and pay the fee of $20, other listings would be made available. In some instances, it is admitted, properties were advertised by Plaintiff without the knowledge or consent of the owner, and in terms quite different from those which the owner had in mind.

"Plaintiff in oral argument contends that the purpose of this type of advertising was to notify the public that it had listings of properties in particular areas. This explanation cannot be accepted." 471 F.Supp., ante, at 420.

In its brief, plaintiff makes two responses.

> "The District Court's reference to 'bait' advertising suggests an illegal practice when in fact it is a common advertising technique, particularly for employment agencies. The District Court makes it appear *all* of Walker's advertising were fictitious when there is no such evidence in the record."

What percentage was fictitious is irrelevant. The testimony of the manager of defendant's classified advertising department was that the continual complaints, including some from the Better Business Bureau, were so numerous that they had to be specially channelled to him.

The general truth of defendant's objections plaintiff concedes.

> "Plaintiff . . . on this appeal will not attempt to refute or even defend allegations that it has engaged in deceptive or misleading practices. Plaintiffs will even concede, for purposes of this appeal, that the conduct of plaintiff's former franchise may have been one motivating factor in the adoption of defendant's rental referral policy."

Plaintiff apparently felt comfortable in this concession because of the general principle that an antitrust violator cannot set himself up as a regulator and justify his own conduct by asserting improper behavior by the injured party. *See, e.g., Perma Life Mufflers, Inc. v. International Parts Corp.*, 1968, 392 U.S. 134, 138-40, 88 S.Ct. 1981, 20 L.Ed.2d 982; *Fashion Originators' Guild of America, Inc. v. Federal Trade Comm'n*, 1941, 312 U.S. 457, 467-68, 61 S.Ct. 703, 85 L.Ed. 949. We do not question this principle, but plaintiff over-applies it. Defendant is not permitted to act as a protector of the public, but it may protect its own property from direct injury. In this sense plaintiff's concession is suicidal.**

** Plaintiff attempts to back away from this concession in its reply brief. Not only was the concession well founded, however, but after one trip to this court, *see Walker*, ante, and an extensive opinion by the district court, we are not impressed by such a change of posture, either as a tactic or in fact.

[1] To disregard the many trees in the briefs of both parties and look at the forest, plaintiff is demanding that a newspaper, whose First Amendment rights in this area are not to be ignored, *see* post, publish advertisements whose misleading nature has drawn the justified criticism of its readers. The court found that the establishment of defendant's policy was motivated by customer complaints. The depth of that motivation establishes its relevancy. Although the district court findings erroneously dwelt in part on the propriety of defendant's conduct in protecting the public, the court also found that defendant's reasons for refusing the advertisements were to avoid being charged with participation in deceptive acts or practices, and "to maintain a quality advertising section for its readers." *Homefinders*, ante, 471 F.Supp. at 423. We could not label such findings plainly wrong; indeed, they seem plainly right.

The fact that defendant may have a monopolistic position does not mean that competitors, assuming plaintiff to be such, can require it to immolate itself. Monopoly or no, the Sherman Act is not aimed at reasonable conduct, and it is not unreasonable for a newspaper to refuse misleading advertising that offends its readers and could turn them away from its classified columns altogether. The quality of Walker's advertisments was even more directly damaging to defendant's reputation than is likely in the customary dilution case. *E.g., Tiffany & Co. v. Boston Club, Inc.*, D.Mass., 1964, 231 F.Supp. 836, 843-44; *Bulova Watch Co. v. Stolzberg*, D. Mass., 1947, 69 F.Supp. 543. Defendant was free to refuse to deal with a party who so lowered the standards of its advertising. *See Byars v. Bluff City News Co.*, 6 Cir., 1979, 609 F.2d 843, 862-63; *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 1 Cir., 1952, 194 F.2d 484, 487-88, *cert. denied*, 344 U.S. 817, 73 S.Ct. 11, 97 L.Ed. 636 ("possibly low business or ethical standards"); *America's Best Cinema Corp. v. Fort*

Wayne Newspapers, *Inc.*, N.D.Ind., 1972, 347 F.Supp. 328, 333-34. Plaintiff fails to distinguish between illegally attempting to maintain a monopoly position and protecting one's assets. *Otter Tail Power Co. v. United States*, 1973, 410 U.S. 366, 380-82, 93 S.Ct. 1022, 1030, 35 L.Ed.2d 359, *Byars*, ante, 609 F.2d at 863 & n.55; *International Railways of Central America v. United Brands Co.*, 2 Cir., 1976, 532 F.2d 231, 239-40. The point at which per se conspiracy principles might overtake concerted prophylaxis is not before us; there is no merit in plaintiff's criticism of the court's finding that defendant's actions were unilateral.

In this circumstance plaintiff claims that defendant's policy would result in the rejection of advertising by anyone who required the prospective tenant to pay a fee in order to obtain rental information, even if that fact were disclosed. If that is so, it is irrelevant. While ultimately Walker may have been willing to state that the tenant would have to pay a fee, he did not correct the other misleading aspects which engendered readers' complaints. Prior to defendant's ultimate decision of February 1973, defendant had already once suspended the publication of Walker's advertisements because of readers' complaints. When defendant permitted resumption, Walker continued as before. Plaintiff's present claim is that defendant should have policed Walker's advertisements, "edit[ed] advertising copy and/or place[d] advertisements in the newspaper in such a way as to insure truthful disclosures." Even apart from the manifest expense to defendant of such a procedure, this suggestion is little short of absurd—the advertiser should do his own policing. Plaintiff's contention, moreover, is peculiarly inappropriate with regard to its own situation. In *In the Matter of Rentex, Inc. T/A Homefinders of America*, 87 F.T.C. 1340 (1976), the Federal Trade Commission, impressed by the misleading character of plaintiff's advertising elsewhere, filed a complaint charging practices

asserted in the present case. Following a consent order that there should be no such conduct in the future, other than what might occur accidentally and non-negligently—as to which plaintiff was required to police itself constantly—plaintiff elected to abandon the referral business altogether. Plaintiff was not interested in a cleaned-up act. Counsel's contentions bear little relation to the facts.

[2] Nor are we moved by plaintiff's attempt to piggy-back on the rights of other parties—none of whom complained—allegedly faced with a policy not to publish even those advertisements which involved no misleading. Plaintiff argues that as the "victim of the anti-competitive policy imposed by the defendant Journal he (sic) can sue those who have combined to effectuate the restraint not only to vindicate his (sic) own interest but as a surrogate attorney to vindicate the public wrong." Plaintiff was not victimized by a restrictive advertising policy. It cannot proceed entirely vicariously, *see Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 1977, 429 U.S. 477, 96 S.Ct. 1101, 47 L.Ed.2d 311; *GAF Corp. v. Circle Floor Co.*, 2 Cir., 1972, 463 F.2d 752, *cert. denied*, 413 U.S. 901, 93 S.Ct. 3058, 37 L.Ed.2d 1045, particularly when no supposed beneficiary of its endeavors is present in the case. We add that plaintiff's continued pressing for an injunction in spite of the well supported finding that it has no bona fide intent to resume doing business in Rhode Island requires no comment.

In conclusion, we observe that for anyone who charges for rental information but advertises without disclosing the hook, it is not only easy, but highly tempting to use artificial bait. Such bait can be made more attractive; furthermore, the fish cannot steal it. Even when it might lack proof of actual fraud, we would hesitate long before holding that a newspaper, monopoly or not, armed with both the First Amendment and a reasonable business justification, can be ordered to

publish advertising against its will. *See Associates & Aldrich Co. v. Times Mirror Co.*, 9 Cir., 1971, 440 F.2d 133, 135-36; *J. J. Gordon, Inc. v. Worcester Telegram Publishing Co.*, 1961, 343 Mass. 142, 177 N.E.2d 586; *cf. Miami Herald Publishing Co. v. Tornillo*, 1974, 418 U.S. 241, 258, 94 S.Ct. 2831, 2839, 41 L.Ed.2d 730. In the present case we see no question. "The antitrust laws are not a shield for deceptive advertising." *Staff Research Assocs., Inc. v. Tribune Co.*, 7 Cir., 1965, 346 F.2d 372, 374.

Affirmed.

Office - Supreme Court, U.S.
FILED
SEP 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-227

In the Supreme Court of the United States

OCTOBER TERM, 1982

PROVIDENCE JOURNAL COMPANY,
PETITIONER,

v.

HOME PLACEMENT SERVICE, INC., AND
JOSEPH P. MUSCHIANO,
RESPONDENTS.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RALPH J. GONNELLA
GONNELLA & DECELLES
511 Wilcox Building
42 Weybosset Street
Providence, R.I. 02903
(401) 272-0255

Dated: September 3, 1982

Blanchard Press, Inc., Boston, Mass.—Law Printers

TABLE OF CONTENTS

	Page
Table of Authorities	i
Statement of the Case	1
Argument	3
A. The Decision Below Does Not Conflict With Any Decision of This Court or of Any Other Circuit Court, is Consistent With Other Sherman Act Anti-Trust Cases and Does Not Impinge Upon or Violate First Amendment Principles	3
B. The Decision Below Does Not Depart From Established Standards of Appellate Review But Rather is Entirely Consistent With Those Standards	9
Conclusion	10

TABLE OF AUTHORITIES

Cases

Brunswick Corp. v. *Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477 (1977)	7
Byars v. *Bluff City News Co.*, 6th Cir. 1979, 609 F.2d 843	6, 7
Giboney v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502, 921 L.Ed 834, 69 S.Ct. 684	4
Homefinders of America, Inc. v. *Providence Journal Co.*, 621 F.2d 441 (1st Cir. 1980)	2, 6
Lorain Journal Co. v. *United States*, 342 U.S. 143 (1951)	4, 5

Page

McLain v. *Real Estate Board of New Orleans*, 444 U.S. 232, 242 (1980) 6

Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974) 5

Mid-Texas Communications Systems, Inc. v. *American Tel & Tel*, 615 F.2d 1372 (5th Cir.) *cert. denied* 449 U.S. 912 (1980) 7, 8

National Society of Professional Engineers v. *United States*, 435 U.S. 679, 690-692 ..... 5, 6

Otter Tail Power Co. v. *United States*, 410 U.S. 366 (1973) 7

Pittsburgh Press Co. v. *Human Relations Comm.*, 413 U.S. 366, 390 (1973) 5

Pullman Standard v. *Swint*, ___ U.S. ___, 102 S.Ct. 1781 (1982) 9, 10

Times-Picayune Pub. Co. v. *United States*, 153, 345 U.S. 594, 626 6

United States v. *Griffith*, 334 U.S. 100, 106 (1948) 6, 9

United States v. *U.S. Gypsum Co.*, 438 U.S. 422 at note 13 6

United States v. *Yellow Cab*, 338 U.S. 338 (1945) 9

Statutes

15 U.S.C. §1 ..... 1, 5

§2 ..... 1, 5, 6.

Federal Rules of Civil Procedure, Rule 52 9

In the
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-227

PROVIDENCE JOURNAL COMPANY,
PETITIONER,

v.

HOME PLACEMENT SERVICE, INC., AND
JOSEPH P. MUSCHIANO,
RESPONDENTS.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Statement of the Case

This action was brought under Sections 1 and 2 of the Sherman Anti-Trust Act 15 U.S.C. § 1 and 2.

Respondents, Home Placement Service, Inc. (Home Placement) and its President, Joseph P. Muschiano (Muschiano) began business in the State of Rhode Island in March-April, 1973. Its business was to sell rental information concerning the availability and location of rental property to prospective tenants for a fee. Home Placement provided its service to landlords free of charge.

Home Placement could market its business in the State of Rhode Island only by advertising in the newspapers published by the Petitioner, The Providence Journal Co. (Journal), the only daily newspaper in Rhode Island with substantial statewide circulation. An advertising expert testified that a rental referral business such as Home Placement had to advertise in petitioner's newspapers if it wanted to attract the necessary clientele to be profitable and thus survive competitively. Economists testified to the Journal's complete monopolistic position in the daily newspaper in the State of Rhode Island.

Home Placement's method of doing business competed directly with the Journal's sale of classified advertising because it drained prospective advertising customers (landlords) from the Journal. Thus, if rental referral businesses were denied advertising in the Journal's newspapers, a whole class of the Journal's direct competitors would be eliminated from the marketplace.

This is precisely what happened. On February 1, 1973 the Journal adopted a policy whereby they refused to accept advertising from all rental referral businesses. The Journal claims that the adoption of this policy was motivated by an earlier bad experience with an unrelated rental referral business, Homefinders of America. *See, Homefinders of America, Inc.* v. *Providence Journal Co.*, 621 F.2d 441 (1st Cir. 1980). However, there was no claim of deceptive practice of unethical behavior by any other rental referral business other than Homefinders. Thus, the effect of the Journal's policy was to eliminate not only Homefinders from the marketplace but all other rental referral businesses, including Home Placement.

As a result of its inability to advertise its business, Home Placement had to go out of business. In fact, the Journal's policy effectively wiped out its competition from rental referral firms.

Argument

A. The Decision Below Does Not Conflict With Any Decision Of This Court Or Of Any Other Circuit Court; Is Consistent With Other Sherman Act Anti-Trust Cases And Does Not Impinge Upon Or Violate First Amendment Principles

Petitioner's belated attempt to transform this matter into a First Amendment case entitling them, as a newspaper publishing company, to preferential treatment under the laws of this land is transparent.[1] The truth is simply that this is a Sherman Act anti-trust case entitling them to no such preferential treatment.

Petitioner, a monopoly newspaper in the State of Rhode Island, refused to accept and/or to publish advertisements from all Rental Referral business including respondent herein. These Rental Referral businesses were petitioner's direct competitors because they provided rental services to landlords free of charge and thus drained prospective customers from the petitioner's classified advertising column. The net effect of petitioner's policy and conduct was to eliminate all rental referral firms (petitioner's competitors) from the marketplace because, as testified to by respondent's experts and unrebutted by petitioner, the only effective way to market the rental referral service in the State of Rhode Island was to advertise in the newspapers published by petitioner.

What is in issue here is the defendant's *conduct* in adopting and enforcing a blanket policy of refusing all rental referral advertising without regard to whether the advertising was deceptive and without regard to the ethical business conduct of the advertiser. Contrary to petitioner's assertion, their

[1] Petitioner's entire argument in the Court of Appeals on the First Amendment issue is contained in a single footnote to its brief.

decision to refuse all rental advertising was not *content* related. The petitioner has always accepted and still does accept and publish advertising which describes apartments or houses for rent. Rather, petitioner's decision to refuse to accept advertising from rental referral businesses was based solely on the fact that Rental Referral businesses *charged the prospective tenant a fee* for rental information. Petitioner's stated policy, advertised daily in their newspapers, reads:

> "REAL ESTATE RENTAL
> ADVERTISING POLICY
>
> The Providence Journal Company does not knowingly accept advertising where a fee is required to obtain rental information. Readers are invited to call if they are being required to pay such fees.
>
> Classified Customer Service, 331-2800".

Clearly, petitioner's decision not to publish these advertisements is not *content* related but instead is related to how the advertiser does business.

Newspaper publishing companies occupy no preferred position under the anti-trust laws and may be prohibited by injunction from refusing advertising when said refusal violates the anti-trust laws. *See, Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951). This Court has recognized that there may be cases under the Sherman Act where the granting of relief may impinge on First Amendment freedoms but:

> "The First Amendment does not 'make it . . . impossible ever to enforce laws against agreements in restraint of trade . . .' *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502, 921 L.Ed. 834, 69 S.Ct. 684. In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may impinge upon rights that

> would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations".
>
> *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690-692

No affirmative relief has yet been granted in this case. However, it is clear that the First Amendment would not prohibit a Court from enjoining the anti-competitive conduct of petitioners in this case.

The Tornillo[3] line of cases are simply inapposite because they are *access* cases not anti-trust cases. In the access cases a person or entity is affirmatively seeking access to the newspaper for publication purposes, but there is no illegality on the part of the newspaper publishing company which has to be remedied. Here the defendants conduct has been deemed to be in violation of the anti-trust laws and the Court is simply remedying the violation by enjoining the violative conduct. This Court has clearly sanctioned this course in this and other contexts. *See, Lorain Journal* v. *United States, supra; Pittsburgh Press Co.* v. *Human Relations Comm.*, 413 U.S. 366, 390 (1973).

Contrary to petitioner's assertion the decision by the Court of Appeals was a reasoned application of the Sherman Act to the facts of this case. Based upon the unrebutted and uncontradicted testimony presented by respondents, the Court of Appeals concluded that the effect of petitioner's Rental Referral Policy was to eliminate petitioner's direct competitors from the marketplace in violation of both Sections 1 and 2 of the Sherman Act. The Court of Appeals did not "straight jacket" petitioner into accepting advertising from all Rental Referral businesses. In fact, in an earlier case, the same Court refused to impose anti-trust liability on petitioner where the record

[3] *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

evidence was found to support a conclusion that the plaintiff in that case had engaged in deceptive practices. *See, Homefinders of America, Inc.* v. *Providence Journal Co.*, 621 F.2d 441 (1st Cir. 1980).[3]

The decision of the Court of Appeals is entirely consistent with many decisions of this Court which hold that conduct which causes an anti-competitive effect on the marketplace violates the Sherman Act regardless of whether said conduct is motivated by an anti-competitive intent.[4] *See, United States* v. *U.S. Gypsum Co.*, 438 U.S. 422 at note 13; *McLain* v. *Real Estate Board of New Orleans*, 444 U.S. 232, 242 (1980) (civil anti-trust claim proven by showing *either* anti-competitive effect or intent). *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690-692 (test of illegality is the effect of defendants conduct on competitive conditions); *United States* v. *Griffith*, 334 U.S. 100, 106 (1948) (unlawful use of monopoly power in violation of Section 2 found without regard to anti-competitive animus). As the Court of Appeals below noted:

> "It makes no difference that defendant's motives may be claimed to have been pure. Specific intent is necessary only when an attempt to monopolize is alleged. *See, Times-Picayune Pub. Co.* v. *United States*, 153, 345 U.S. 594, 626. Lack of bad purpose is irrelevant where the defendant already possesses monopoly power and, without justification, uses it to exclude competition. *United States* v. *Griffith*, 1948 334 U.S. 100, 105. *Byars* v. *Bluff City News Co.*, 6 Cir., 1979, 609 F.2d 843. We

[3] Senior Judge Baily Aldrich wrote both the Homefinders and Home Placement decisions for the First Circuit.

[4] Petitioner's statement that there was only "hypothetical . . . competition . . ." and no showing of anti-competitive effect, *Petition for Certiorari at 21*, is quite remarkable in light of the Court of Appeals recitation of some of the undisputed facts concerning same. See, A. 6-7.

> agree with the court in *Byars* that 'what should matter is not the monopolist's state of mind, but the overall impact of the monopolist's practices'. Id. at 680. When the foreseeable and proximate consequence of defendant's conduct was unreasonably to perpetuate an already existing monopoly by excluding a potential competitor, it would be of no solace to plaintiff, or the consumers the anti-trust laws were designed to protect, that the defendant may not have been seeking this result."
>
> A.12

The Sherman Act protects "competition". *See, Brunswick Corp.* v. *Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477 (1977). Under petitioner's view destruction of competition would be permitted under the Sherman Act so long as it was done in "good faith". Here, petitioner did not demonstrate a necessity for such anti-competitive conduct and thus no justification existed for conduct which eliminated an entire class of competitors from the marketplace. *Cf. Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973).

The only circuit case to which petitioner points for conflict is *Mid-Texas Communications Systems, Inc.* v. *American Tel & Tel*, 615 F.2d 1372 (5th Cir.) *cert. denied* 449 U.S. 912 (1980).[5] Petitioner argues that the Fifth Circuit decision conflicts with the decision that the First Circuit in this case because the First Circuit:

> "...simply brushed aside the Journal's good faith 'articulable concerns' about its readers and about its journalistic integrity..."
>
> *Petition for Certiorari at* 23.

[5] The other case cited by petitioner *at* 23 supports respondent's position.

Regardless of the correctness of the *Mid-Texas Communications Systems* decision by the Fifth Circuit, it does not conflict with the decision of the First Circuit in this case. The First Circuit did not "brush aside" petitioner's proffered business justification. Rather, accepting the business justification as proffered, the Court deemed said justification inadequate *as a matter of law*. Thus, the First Circuit gave full consideration to all the undisputed facts concerning the proffered business justification and found said justification inadequate in the face of an anti-competitive policy which eliminated a whole class of petitioners competitors from the marketplace. There is no conflict with the Fifth Circuit's decision in *Mid-Texas Communication* because all of the undisputed facts concerning the proffered justification were considered by both the trier of fact and the Court of Appeals in this case—precisely what the Fifth Circuit said should have been done in *Mid-Texas Communications*. That Court of Appeals in this case reached a different legal conclusion than did the District Court on the undisputed facts is not unusual.

Finally, the decision below does not restrict the right of a state to regulate the activities of Rental Referral businesses. The cases relied on by Petitioner[6] represent *state* activity to regulate advertising practices in the professions or to regulate rental referral agencies. States have traditionally regulated advertising practices of real estate businesses and professions, but that does not mean that a private entity, petitioner herein, has that same power and authority to regulate and/or eliminate rental referral businesses from the marketplace in violation of the Sherman Act.

---

[6] *See, Petition for Certiorari at* 24-26 and note 11. Moreover contrary to petitioner's assertion that rental advertising is inherently deceptive, the Federal Trade Commission did investigate the rental referral business, and although it did impose restructions, it did not find the rental referral practice inherently deceptive. *See, In the matter of Rentex, Inc.*, T/A Homefinders, 1976 87 F.T.C. 1304.

B. The Decision Below Does Not Depart From Established Standards Of Appellate Review But Rather Is Entirely Consistent With Those Standards

Petitioner argues that the Court of Appeals' decision is in violation of Rule 52 FRCP and conflicts with this Court's decision in *Pullman Standard* v. *Swint*, ____ U.S. ____ 102 S.Ct. 1781 (1982). Nothing could be further from the truth.

In *Swint* this Court held that a district court's findings of fact on *discriminatory intent* could not be set aside unless clearly erroneous as required by Rule 52 FRCP. The *Swint* decision is not contrary to the decision below because the Court of Appeals did not set aside any findings by the district court concerning the petitioner's anti-competitive intent. Rather the Court of Appeals concluded from undisputed and uncontradicted historical facts that petitioner's conduct had an anti-competitive effect on the marketplace and thus was unlawful.[7] This Court recognized this anti-trust approach in *Swint* by citing to Justice Black's dissent in *United States* v. *Yellow Cab*, 338 U.S. 338 (1945):

> "Relying on *United States* v. *Griffith*, 334 U.S. 100, (1948) [Justice Black] argued that it is not always necessary to prove 'specific intent' to restrain trade; it is enough if a restraint is the result or consequence of a defendant's conduct or business arrangements. Such an approach, however, is specifically precluded by § 703(h) in Title VII cases challenging seniority systems".
>
> *Pullman Standard* v. *Swint, supra* at ____.

[7] The Court of Appeals did set aside as clearly erroneous the district court's findings that Homefinders business and advertising practices were indistinguishable from Home Placement's business and advertising practices. A.2. Thus, the business justification for the refusal the Court found in Homefinders was not present in Home Placement.

Thus, there was no issue of intent for the Court of Appeals to resolve because of the anti-competitive effect of petitioner's conduct. Moreover, the Court of Appeals decision to decide legal issues not reached by the District Court was proper because the historical facts concerning the merits of the anti-trust violation were undisputed. In fact, respondent's testimony and evidence on the anti-trust issues was unrebutted and uncontradicted. Petitioner presented no witnesses, expert or otherwise, on the anti-trust issues but rather relied solely on evidence of customer complaints of bad business practices and deceptive advertising of Homefinders (an unrelated business enterprise) but not of Home Placement.

Thus, the Court of Appeals approach in this case was to apply a proper legal analysis to undisputed historical facts, an approach entirely consistent with both Rule 52 FRCP and this Court's decision in *Pullman Standard* v. *Swint, supra.*

Conclusion

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RALPH J. GONNELLA
GONNELLA & DECELLES
511 Wilcox Building
42 Weybosset Street
Providence, R.I. 02903
(401) 272-0255

Dated: September 3, 1982

MOTION FILED
SEP 14 1982

No. 82-227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PROVIDENCE JOURNAL CO.,
Petitioner,

v.

HOME PLACEMENT SERVICE, INC., and
JOSEPH P. MUSCHIANO,
Respondents.

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

W. TERRY MAGUIRE
Counsel of Record
L. PEYTON HENDRICKS
AMERICAN NEWSPAPER
PUBLISHERS ASSOCIATION
The Newspaper Center
Box 17407
Dulles International Airport
Washington, D.C. 20041
(703) 620-9500

Attorneys for American Newspaper Publishers Association

PARRISH PRESS, WASHINGTON—1001 N. OAK STREET, ARLINGTON, VA 22209—(703) 522-6000

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
INTEREST OF THE *AMICUS*	1
STATEMENT OF THE CASE	2
ARGUMENT	2
I. The First Amendment Guarantees A Publisher The Right To Reject Advertising	2
II. Petitioner's Rejection Of Advertising Did Not Violate The Antitrust Laws	6
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	Page
Adult Film Association v. Times Mirror, 97 Cal.App. 3d 77 (Cal. Ct. App. 1979)	
Associated Press v. NLRB, 301 U.S. 103 (1937)	3
Associated Press v. United States, 326 U.S. 1 (1945)	3,5
Bates v. State Bar of Arizona, 433 U.S. 350 (1977)	5
Bigelow v. Virginia, 421 U.S. 809 (1975)	5
Citizens Publishing Co. v. United States, 394 U.S. 131 (1969)	3
Fiorino v. Globe Newspaper Co., 5 Med.L.Rptr. 1988 (Mass. Super. Ct. 1979)	6
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	4
Grosjean v. American Press Co., 297 U.S. 233 (1936)	3
Homefinders, Inc. v. Journal Co., 641 F.2d 441 (1st Cir. 1980)	9
Hutchinson v. Proxmire, 433 U.S. 111 (1979)	4
Lorain Journal Co. v. United States, 342 U.S. 143 (1951)	8
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)	5,6
Mid Texas Communications Systems, Inc. v. American Telephone and Telegraph Co., 615 F.2d 1372 (5th Cir. 1980), cert. denied, 442 U.S. 912 (1980).	9
Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976)	6,8
National Auto Brokers Corp. v. General Motors Corp., 1980-2 Trade Cases Para. 63,337 (SD NY 1980)	7
National Tire Wholesale, Inc. v. Washington Post Co., 441 F. Supp. 81 (D.D.C. 1977), aff'd per curiam, 595 F.2d 888(D.C. Cir. 1979)	7

	Page
New York Times v. Sullivan, 376 U.S. 254 (1964)	5
Person v. New York Post, 427 F. Supp. 1297 (ED NY) aff'd mem. 573 F.2d 1294 (2d Cir. 1977)	6,8
Pittsburgh Press Co. v. The Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973)	5
St. Amant v. Thompson, 390 U.S. 727 (1968)	4
Staff Research Associates v. Tribune Co., 345 F.2d 372 (7th Cir. 1965)	7
Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953)	3
United States v. Colgate & Co., 250 U.S. 300 (1919)	7
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)	5
Wisconsin Assn. of Nursing Homes, Inc. v. Journal Co., 92 Wis. 709, 285 N.W. 2d 891 (1979)	6
CONSTITUTION:	
United States Constitution, Amendment 1	*passim*
STATUTORY PROVISION:	
15 U.S.C. Section 1 and 2	*passim*
TREATISES:	
2 Z. Chafee, Government and Mass Communications (1947)	3,4
Commission on Freedom of the Press, A Free and Responsible Press (1947)	3
ARTICLE:	
18 A.L.R. 3d 1287 (1979)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-227

PROVIDENCE JOURNAL CO.,
Petitioner,

v.

HOME PLACEMENT SERVICE, INC., and
JOSEPH P. MUSCHIANO,
Respondents.

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The American Newspaper Publishers Association (hereinafter "ANPA") respectfully moves this Court for leave to file the accompanying Brief *amicus curiae* in support of the Petition for Writ of Certiorari filed by Petitioner Providence Journal Co. Although the attorneys for Petitioner have consented to the ANPA's filing of a Brief *amicus curiae*, Respondents have withheld their consent to such filing.

ANPA is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of about 1400 newspapers constituting over 90 percent of the daily and Sunday circulation and a substantial portion of the weekly circulation in the United States. Petitioner's newspaper is a member of the association.

The decision of the Court of Appeals for the First Circuit presents major issues of widespread importance to all newspapers concerning the First Amendment right to control the advertising content of their publications. The lower court decision must be reversed because it is inconsistent with free press guarantees firmly established by this Court. The choice of material published in a newspaper is a matter of editorial discretion and may not be subjected to governmental interference or regulation.

If the decision below is permitted to stand, it would result in a significant intrusion into established principles of First Amendment freedom, as well as permit an unwarranted variance from settled antitrust standards applied to the newspaper business. Thus, it would have a direct and adverse impact on ANPA's member newspapers.

ANPA seeks in its Brief *amicus curiae* to offer the Court a succinct discussion of the errors of the Court of Appeals. The arguments supplement and do not merely restate those of the Petitioner.

Wherefore, the American Newspaper Publishers Association requests this Court to grant this motion and permit ANPA to file its attached Brief *amicus curiae*.

Respectfully submitted,

W. Terry Maguire

American Newspaper Publishers Association
The Newspaper Center
Box 17407
Dulles International Airport
Washington, D.C. 20041
(703) 620-9500

Attorney for American Newspaper Publishers Association

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-227

PROVIDENCE JOURNAL CO.,
Petitioner,

v.

HOME PLACEMENT SERVICE, INC., and
JOSEPH P. MUSCHIANO,
Respondents.

BRIEF *AMICUS CURIAE* OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") submits this Brief *amicus curiae* in support of the Petition for Writ of Certiorari of the Providence Journal Co.

INTEREST OF THE *AMICUS CURIAE*

As set forth in its motion for leave to file this brief, ANPA is a non-profit association of newspapers; the organization has a significant interest in insuring that the First Amendment guarantee of a free press is not abridged.

In the decision below, the Court of Appeals failed to consider the overriding First Amendment interest which protected the Petitioner's right to refuse Respondents' advertising.

This Court has firmly established that a newspaper's determination of what it publishes is an activity fully protected by the First Amendment. Lower courts have consistently relied on the First Amendment in holding that the exercise of a publisher's discretion in rejecting advertising is lawful.

Because the decision of the Court of Appeals ignores the First Amendment and settled antitrust law, ANPA desires to present to this Court, for its assistance, ANPA's supplemental views on the important issues placed before the Court by the Petitioner for Writ of Certiorari.

STATEMENT OF THE CASE AND CONSTITUTIONAL AND STATUTORY ISSUES INVOLVED

Amicus adopts the Statement of the Case and Constitutional and Statutory Provisions Involved of Petitioner Providence Journal Co.

ARGUMENT

I. THE FIRST AMENDMENT GUARANTEES A NEWSPAPER PUBLISHER THE RIGHT TO REJECT ADVERTISING

The decision of the Court below strikes at a fundamental First Amendment principle—the right of a newspaper publisher to exert control over the content of the newspaper. The decision as to what material is or is not published in each edition is the most elemental judgment that any newspaper publishing enterprise is privileged to make.

Two central issues must be addressed in the process of reviewing the opinion of the Court below. One deals with the First Amendment ramifications of the application of the antitrust laws to newspapers. The other deals with the application of the First Amendment to acceptance or rejection of advertising.

There is no question that newspapers are subject to general business laws of uniform application. But the First Amendment cannot be ignored simply because antitrust or other general business laws are invoked. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Associated Press v. NLRB*, 301 U.S. 103 (1937); *Associated Press v. United States*, 326 U.S. 1 (1945); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *Citizens Publishing Co. v. United States*, 394 U.S. 131 (1969).

The constitutional delicacy of applying the antitrust laws to the press was articulated well in the 1947 report by the Commission on Freedom of the Press:

> Though there can be no question that the antitrust laws apply to the communications industry, we would point out that these laws are extremely vague. They can be very dangerous to the freedom and the effectiveness of the press. They can be used to limit voices in opposition and to hinder the process of public education.
>
> Since the Commission looks principally to the units of the press itself to take joint action to provide the diversity, quantity, and quality of information and discussion which a free society requires, it would not care to see such action blocked by the mistaken application of the antitrust laws. Commission on Freedom of the Press, *A Free and Responsible Press*, at 85 (1947).

"Grave difficulties" emerge when "we try to apply to the mass media of communication legal obligations which were developed in the very different area of railroads, gas companies and hotels, . . . [The] differences between the press and businesses generally are just as significant as the resemblances." 2 Z. Chafee, Government and Mass Communications, at 634 (1947) (hereinafter cited as "Chafee")

The Court of Appeals failed to consider any First Amendment interest; in fact, the First Amendment is not even mentioned in that Court's opinion. This failure to take into account

any First Amendment interest whatsoever alone is grounds for remand or reversal.[1]

The facts of this case cannot be treated as a mere business action unrelated to the exercise of First Amendment rights. The case deals with the basic process of publishing a newspaper.

The publisher of a daily newspaper has full responsibility for assembling the entire newspaper—for making the day's package of information interesting, useful, reliable and well-received by the newspaper's readers. Judgment and skill are required in order to do the job well.

Zechariah Chafee, writing in 1947, described the process in these terms:

> Take a newspaper. One controversial issue after another is raised by events, which must be rapidly presented in type. Fairness in dealing with each issue depends on a great many factors—available space and time, the cost of extensive investigation, judgments about the knowledge and truthfulness of informants and about the value of arguments, devotion to inner convictions, and so on. No statute enacted years ago, no order formulated weeks ago, can allow for all these factors which vary with every controversy and every significant event. They have to be balanced fast by a man on the spot with printer's ink in his blood. Any judge or official who undertook to displace the editorial staff and write the newspaper would do a miserable job even if the First Amendment did not forbid him to try. Chafee, at 643-644.

The First Amendment envisions a system in which the decision as to what articles are carried, and what advertising is

---

[1] This Court, for example, frequently has returned cases to the lower courts for failure to adhere to standards aimed at preserving First Amendment rights. See, *e.g.*, *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974); *Hutchinson v. Proxmire*, 433 U.S. 111 (1979).

accepted, is made free from the threat of government interference.[2] If the process is not insulated from government involvement, the overall editorial process is threatened.[3] Without such insulation, there is danger that editorial decision-making may be in response to potential governmental sanction rather than in response to what reason and judgment tells an editor or publisher should be printed. *Associated Press v. United States,* supra, at 20 fn. 18 (1945).[4] Uniformly, the courts have rebuffed demands by outside parties claiming access to the advertising services of a newspaper.[5]

The rationale for First Amendment protection for a newspaper's control over its content was best articulated by this Court in its landmark holding in *Miami Herald Publishing Co.*

---

[2] The advertising content of a newspaper is entitled to First Amendment protection. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

[3] This Court has noted "the narrowness of the recognized exceptions to the principle that the press may not be regulated by the Government." *Pittsburgh Press Co. v. The Pittsburgh Commission on Human Relations*, 413 U.S. 376, 382 (1973). The Court's ruling in *Pittsburgh Press*, upholding a restriction upon the use of gender-designated classified advertising, turned upon the illegality of the commercial activity itself—i.e., aiding unlawful employment practices. This narrow exception cannot be widened to encompass the facts of this case without violating editorial freedom fully protected by the First Amendment.

[4] Petitioner has collected numerous cases in which courts, sometimes in addition to First Amendment grounds, have upheld newspapers' rejection of advertising on the basis of common law and public policy. Brief of Pet., at 14 Fn. 7. See also, Annotation 18 ALR 3d 1287 (1979).

[5] With this freedom from government regulation also goes responsibility for what is published. Due to this ultimate potential liability, among other factors, a newspaper's choice as to what is included and what is excluded involves much more than a simple decision to accept or reject an order for goods or services. Such responsibility for advertising content has been recognized directly by this Court. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

v. Tornillo, 418 U.S. 241 (1974). After fully reviewing the policy arguments in favor of compelled access to a newspaper, the Court rejected them outright and, speaking through Chief Justice Burger, declared:

> "... [A] newspaper is more than a passive receptacle for news, comment, and advertising. The choice of material to go into a newspaper ... constitutes the exercise of editorial control and judgment." 418 U.S. at 258 [footnote omitted]

Lower courts have consistently refused to grant private parties access to a newspaper's advertising columns, recognizing that *ad hoc* judicial interference with a publisher's First Amendment right to exercise its editorial discretion in the selection of advertisers is as invidious as wholesale denial of that right. See, *e.g.*, *Person v. New York Post*, 427 F.Supp. 1297 (ED NY) *affd. mem.* 573 F.2d 1294 (2d Cir. 1977); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1075 (5th Cir. 1976) *cert. denied*, 430 U.S. 982 (1977) and *Wisconsin Assn. of Nursing Homes, Inc. v. Journal Co.*, 92 Wis. 709, 285 N.W.2d 891 (1979).[6]

These decisions clearly reflect the compelling nature of the First Amendment right granted a newspaper publisher to accept or reject advertising. The Court of Appeals failed to apply this right to the facts of this case and such an omission cannot be condoned by this Court.

---

[6] A private plaintiff's allegation that a newspaper unlawfully restrained trade by refusing to accept plaintiff's placement service advertisement was also given short shrift by the court in *Fiorino v. Globe Newspaper Co.*, 5 Med.L.Rptr. 1988 (Mass. Super. Ct. 1979). That court treated the First Amendment as an absolute defense to the alleged trade restraint, holding, in reliance on *Miami Herald Publishing Co.*, that,

> "The United States Supreme Court has specifically afforded a newspaper absolute choice in the material which it publishes [citations omitted]" 5 Med.L.Rptr. 1988, 1989.

II. PETITIONER'S REJECTION OF ADVERTISING DID NOT VIOLATE THE ANTITRUST LAWS.

The Court below compounded its error of disregarding newspapers' First Amendment right to reject advertising by claiming that Petitioner's rejection was not within the zone of latitude in customer selection that is permitted for firms which enjoy substantial dominance in the marketplace. Brief of Pet. App. A-4, A-5. In so doing, the Court exceeded both the First Amendment rights of the newspaper and the bounds of the antitrust laws.

Newspapers must make a variety of editorial judgments concerning acceptance of advertising. On occasion, those decisions may affect categories of businesses, and may be based on knowledge of the business or on experience with its representatives. Such action is wholly consistent with decisions of this Court and lower courts construing the Sherman Act.

In *United States v. Colgate & Co.*, 250 U.S. 300 (1919), this Court held that unilateral refusals to deal, which are reasonably ancillary to a lawful business purpose, are not condemned by the Sherman Act. The Court acknowledged that this variety of restraint is often necessary to the commercial objectives of business and is central to the system of free enterprise in the United States.

Despite numerous assaults during the intervening years, the vitality of *Colgate* remains unimpaired, and lower courts continue to approve unilateral refusals to deal that are reasonably ancillary to a lawful business purpose. Its principle has been consistently applied to the business decisions of newspapers affecting advertisers.[7]

---

[7] Numerous cases have upheld newspapers' actions in dealing with advertisers, in the face of allegations of violations of Sections 1 and 2 of the Sherman Act: See, *e.g.*, *Staff Research Associates v. Tribune Co.*, 345 F.2d 372 (7th Cir. 1965) (acceptance conditioned on newspaper selection of advertising classification); *National Tire Wholesale, Inc. v. Washington Post Co.*, 441 F. Supp. 81 (D.D.C. 1977), *aff'd. per curiam*, 595 F.2d 888 (D.C. Cir. 1979) (newspaper designation of placement); *National Auto Brokers*

(footnote continues)

For newspapers, it is difficult to envision a practice more reasonably related to the purpose of the business than the adoption of a policy of excluding advertising known to pose a real or potential harm to readers.

The categories of advertisers whose material may sometimes be unsuitable for presentation in the newspaper, and therefore a source of grave concern to the publisher are numerous. These include, among others, advertising for pornographic film theaters,[8] invitations to purchase interests in litigation[9] and advertising for homosexual counseling and legal aid.[10]

A variety of reasons prompt newspapers to examine proffered material according to its general nature as well as its specific content. Important among these is the publisher's desire to protect readers from potentially harmful material placed by unscrupulous persons.[11]

(footnote continued)

Corp. v. General Motors Corp., 1980-2 Trade Cases Para. 63,337 (SD NY 1980) (policy relating to newspaper's classifications of "new" and "brand new" cars).

Other cases have held that a newspaper's degree of market power, when viewed in the light of the facts of the case, contributes significantly to a finding of a Section 2 violation. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). *Lorain Journal*, however, is distinguishable from this case on the basis of both the surrounding circumstances and the "competition" which the Court of Appeals held to exist. In *Lorain Journal*, a newspaper, with clearcut predatory intent, forced its advertisers to boycott a competing radio station. In contrast, no anticompetitive motives were present in this case. The only motive attributed to Petitioner's actions was that of preserving the newspaper editorial integrity by refusing advertising relating to a business activity for which no record of competition with the newspaper was developed.

[8] *Adult Film Association v. Times Mirror*, 97 Cal. App. 3d 77 (Cal. Ct. App. 1979).

[9] *Person v. New York Post, supra.*

[10] *Mississippi Gay Alliance v. Goudelock, supra.*

[11] Valid economic considerations might also justify exclusion of certain classes of advertising. For example, high production costs might make certain kinds of advertising unprofitable. Also newspapers must undertake to shield themselves against secondary liability for advertising material which may, for instance, be defamatory. Time constraints are an additional factor.

The Court of Appeals dismissed Petitioner's efforts in this regard as paternalistic. To the contrary, such screening is an important obligation to readers which newspapers have voluntarily assumed. Publishers generally recognize that readers rely on the newspaper for accurate commercial as well as non-commercial information.

Since publishers have the right to make judgments as to the acceptability of advertising, they must also be able to adopt policies which permit advertising decisions based on the general nature of the advertised business. Such business policies fit within the category of conduct which this Court in *Colgate* intended to be exempt from antitrust attack. See, e.g., *Mid-Texas Communications Systems, Inc. v. American Telephone and Telegraph Co.*, 615 F.2d 1372 (5th Cir. 1980), *cert. denied*, 442 U.S. 912 (1980).

The *Providence Journal*, as the District Court found, approached its responsibilities in this case in a prudent manner. *Home Placement Service, Inc. v. Providence Journal Company*, Brief of Pet. App. A-16, A-18. The newspaper refused to accept the advertising at issue here based on its previous dealings with a rental referral business which offered services to the newspaper's readership that were functionally identical to those of Home Placement. As a result, the *Journal* had been subjected, *inter alia*, to complaints from irate readers; expenditures of managerial time in efforts to have the advertiser desist from its "bait and switch" tactics; and, finally, costly litigation defending its lawful actions in terminating the advertising. *Homefinders, Inc. v. Journal Co.*, 641 F.2d 441 (1st Cir. 1980).

Consequently, the *Journal* had reason to view with considerable caution the prospect of future dealings with any business selling a rental referral scheme to its readers. The final judgment was based on the publisher's assessment of prior experience, and the conclusion that it would not be in the best interest of the newspaper's readers to carry this particular advertising. A unilateral refusal to deal under these circumstances is entirely consistent with settled antitrust principles.

CONCLUSION

The opinion of the Court of Appeals amounts to an unwarranted denial of a newspaper's First Amendment right to reject advertising.

The failure of the Court to address the First Amendment issue, or to abide by other clear antitrust precedent, justifies the grant of the petition for certiorari, and remand or reversal.

Respectfully submitted,

W. TERRY MAGUIRE
L. PEYTON HENDRICKS

American Newspaper Publishers Association
The Newspaper Center
Box 17407
Dulles International Airport
Washington, D.C. 20041
(703) 620-9500

Attorneys for Amicus Curiae

Office-Supreme Court, U.S.
FILED
FEB 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-227

In the Supreme Court of the United States

OCTOBER TERM, 1982

PROVIDENCE JOURNAL COMPANY, PETITIONER

v.

HOME PLACEMENT SERVICE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

ABBOTT B. LIPSKY, JR.
Deputy Assistant Attorney General

JOHN J. POWERS, III
MARION L. JETTON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the First Amendment allows a newspaper publisher to engage in conduct that would be illegal under the Sherman Act if carried out by other businesses.

2. Whether the court below erred in concluding that petitioner did not have a reasonable business justification for its actions.

3. Whether the court below failed to comply with Fed. R. Civ. P. 52.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Constitutional and statutory provisions involved 2

Statement 2

Discussion 6

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Abbott Laboratories v. *Portland Retail Druggists Association*, 425 U.S. 1 6

Associated Press v. *NLRB*, 301 U.S. 103 6

Associated Press v. *United States*, 326 U.S. 1 ..... 7, 8, 9

Branzburg v. *Hayes*, 408 U.S. 665 6

Central Hudson Gas & Electric Corp. v. *Public Service Commission*, 447 U.S. 557 9

Citizen Publishing Co. v. *United Stataes*, 392 U.S. 131 7

Eastern R.R. Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 7

FCC v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 7

Gamco, Inc. v. *Providence Fruit & Produce Bldg. Inc.*, 194 F.2d 484, cert. denied, 344 U.S. 817 10-11

Page

Cases—Continued:

Homefinder's of America, Inc. v. *Providence Journal Co.*, 416 F. Supp. 416, aff'd, 621 F.2d 441 ..... 2, 10, 11

Indiana Farmers Guide Publishing Co. v. *Prairie Farmer Publishing Co.*, 293 U.S. 268 7

Lorain Journal v. *United States*, 342 U.S. 143 ..... 7, 8

Mid-Texas Communications Systems, Inc. v. AT&T, 615 F.2d 1372, cert. denied, 449 U.S. 912 10

National Gerimedical Hospital & Gerontology Center v. *Blue Cross*, 452 U.S. 378 6

Ohralik v. *Ohio State Bar Association*, 436 U.S. 447 9

Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186 6

Otter Tail Power Co. v. *United States*, 410 U.S. 366 11

Pittsburgh Press Co. v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 9

Union Labor Life Ins. Co. v. *Pireno*, No. 81-389 (June 28, 1982) 6

United States v. *Griffith*, 334 U.S. 100 11

United States v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, aff'd per curiam, 365 U.S. 567 11

Page

Constitution, statutes and rule:

United States Constitution, First Amendment 2, 6, 7, 8

Sherman Act, Section 1, 15 U.S.C. 1 *et seq.* 2, 3, 4, 5, 12

Section 2, 15 U.S.C. 2 ..... 2, 3, 5, 10, 11

Fed. R. Civ. P. 52 12

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-227

PROVIDENCE JOURNAL COMPANY, PETITIONER

v.

HOME PLACEMENT SERVICE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 682 F.2d 274. The district court's opinion (Pet. App. A14-A19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1982. The petition for a writ of certiorari was filed August 9, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the First Amendment to the Constitution and Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2) are set forth at Pet. 2-3.

STATEMENT

1. This case is the second private antitrust action involving the refusal of petitioner, Providence Journal Company, to accept classified advertisements from rental referral services. The rental referral agency in the first litigation, Homefinders of America, Inc., ran brief, untraceable classified ads, often for nonexistent properties (Pet. App. A2). When a rental prospect called the telephone number listed in the ad, he was told that the property was no longer available, but that, for a fee of $20, other listings would be made available (*id.* at A56). The ads for the nonexistent properties were enticing, often representing, for example, that pets or children were welcome, that parking was available, or that the cost of utilities was included in the rent (*ibid.*). Homefinders often included properties on its lists without consent of the property owners (*ibid.*). Providence Journal received a large number of complaints about these practices, and ultimately refused to accept any more of Homefinders' advertisements (*id.* at A3, A37). Homefinders' operator thereupon sued petitioner under Sections 1 and 2 of the Sherman Act (15 U.S.C. 1 and 2), seeking, *inter alia*, damages and injunctive relief (Pet. App. A37).

The district court entered judgment in petitioner's favor (*Homefinder's of America, Inc.* v. *Providence Journal Co.*, 471 F. Supp. 416, 422-423 (D.R.I. 1979) (Pet. App. A36-A53)), and the First Circuit affirmed (621 F.2d 441 (1980) (Pet. App. A54-A61)). The court of appeals held that even if petitioner had a monopolistic position, the Sherman Act "is not aimed at reasonable conduct," and petitioner's refusal

of advertising "that offends its readers and could turn them away" is "not unreasonable" (Pet. App. A58).

2. In the present case, unlike the Homefinders litigation, respondent Home Placement Service, Inc., advertised properties that were actually available, and petitioner did not receive any complaints during the short period that it carried respondent's advertisements (Pet. App. A2-A3). Respondent's referral business was similar to that of Homefinders', however, in that respondent was selling a listing of rental properties and would promote this list to persons responding to its advertising (*ibid.*). Landlords could advertise free of charge in respondent's publication, and respondent derived its revenues from the sale of lists to prospective renters (*id.* at A2, A6).

As a result of its difficulties with the plaintiff in the first case, the petitioner adopted a policy, which it printed daily in its paper, that it would not accept "advertising where a fee is required to obtain rental information" (Pet. App. A3). Respondent advertised in petitioner's newspaper for about two weeks before respondent's president was told that its advertising would no longer be accepted (*id.* at A8, A16). Respondent then promised not to assess a fee in connection with the properties it advertised in the Providence Journal, and the newspaper agreed to run the ads again (*ibid.*). Respondent went out of the rental referral business shortly afterward (Pet. 8-9).

3. Respondent brought an action against petitioner in the United States District Court for the District of Rhode Island charging petitioner with violating Sections 1 and 2 of the Sherman Act (Pet. App. A14). The district court ruled for the petitioner. As to the Section 2 claim, based on monopolization, it held that respondent had not shown the existence of monopoly power because it failed to define the relevant market (Pet. App. A17). The district court further concluded that petitioner's refusal to deal was a reasonable

business decision because the Homefinders and Home Placement schemes were "indistinguishable" (*id.* at A18). As to the Section 1 claim, based on conspiracy in unreasonable restraint of trade, the district court held that the petitioner's refusal to deal was unilateral and there was accordingly no conspiracy or combination (*id.* at A19).

The court of appeals reversed (Pet. App. A1-A13). It held that the district court's finding that the present advertising scheme was "indistinguishable" from the earlier scheme was "clearly erroneous" (*id.* at A2). The court of appeals noted that there were no complaints about respondent's business practices, nor was there any showing that the advertised descriptions were false or misleading (*id.* at A2-A4). The court of appeals decided that it could not "accept that the sale of rental information is an inherently and unfailingly deceptive practice," and it therefore concluded that there was no valid business reason for rejecting ads for rental referral agencies simply on the ground that the agencies charged a fee (*id.* at A4-A5).

The court of appeals noted that a newspaper is presumptively free to choose its advertising, but added that this freedom may be limited in special circumstances, such as when the newspaper is dealing with its competitors (Pet. App. A5-A6). The court disagreed with the district court's finding that the newspaper's policy here did nothing "other than reduce its advertising revenues" (*id.* at A6-A7). The court of appeals concluded that there was extensive record evidence that rental referral businesses are in direct competition with newspapers selling more traditional forms of rental advertising. Since the respondent's services are free to landlords, respondent "could siphon off lessors by saving them the cost of [petitioner's] columns" (*id.* at A7). Further, market data introduced in the district court demonstrated that the classified section of the largest metropolitan newspaper in the area is "the essential medium for [the] survival"

of rental referral services (*ibid.*). Thus, rather than simply reducing the Providence Journal's present revenues, petitioner's refusal to deal with respondent actually protected its future advertising revenues (*ibid.*).

The court of appeals found violations of both Section 1 and Section 2 of the Sherman Act. It determined, with respect to the Section 1 conspiracy complaint, that the newspaper's action was not unilateral. The newspaper went beyond simply refusing to publish respondent's ads — the paper agreed to resume publication if the respondent agreed to its terms. This amounted to a combination "which, in effect, fixed a maximum price of zero on respondent's sale of rental information" (Pet. App. A8). The court noted that an unlawful combination is not avoided simply because one of the parties to the agreement is an unwilling participant, and it concluded that the combination in this case could not be upheld as reasonable because "it served no legitimate business purpose" and tended to destroy competition (*id.* at A8-A9).

As for the Section 2 monopolization claim, the court of appeals held that the newspaper was using its dominance in one market (the newspaper rental advertising market) to foreclose competition in another (the housing vacancy information market) (Pet. App. A9). The court of appeals concluded that "with respect to the sale of rental advertising within the City Zone [petitioner] was a monopolist" (*id.* at A11-A12).[1] Further, petitioner's refusal to run respondent's ads "put [respondent] out of the rental referral business,"

---

[1]The court found that petitioner offered "no rebuttal of [respondent's] substantial evidence" that there was no effective substitute for daily newspaper rental advertising available to it (Pet. App. A10). Further, there were no daily papers "effectively competing" for advertisement of property located within the central city zone. Within that zone, petitioner "had an uncontested lock on the sale of rental listings" (*id.* at A11).

thereby removing a potential competitor in the listing of rental information (*id.* at A12). Although this would be permissible if the monopolist had "a legitimate business reason," that reason was lacking here (*ibid.*).[2]

DISCUSSION

The decision below does not conflict with the decisions of any other circuit and is in accord with the decisions of this Court. Further, petitioner's disagreements with the court below turn in part on the proper characterization of the facts of this case under accepted principles of law. In these circumstances, the case does not present questions meriting review by this Court.

1. Relying on the First Amendment, petitioner asserts that a newspaper "operates within a larger zone of reasonableness" than other businesses, particularly where decisions regarding acceptance of advertising are involved.[3] Pet. 17; see also Pet. 15. Newspapers, however, have no special immunity from the application of general laws. *Branzburg* v. *Hayes*, 408 U.S. 665, 682-683 (1972). See also, *e.g.*, *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 192 (1946) (Fair Labor Standards Act); *Associated Press* v. *NLRB*, 301 U.S. 103, 132-133 (1937) (National Labor Relations Act). Nor are their commercial dealings exempt from the Sherman Act.[4] Indeed, this Court has stated that:

---

[2]The court of appeals remanded the case for determination of the appropriate relief (Pet. App. A13).

[3]Petitioner raised this First Amendment issue in its brief in the court of appeals only in a footnote. The court of appeals, accordingly, did not address the issue in its opinion, and this Court therefore does not have the benefit of its views.

[4]There is no express exemption from the Sherman Act for newspapers. Implied exemptions from the antitrust law are not favored. See, *e.g.*, *Union Labor Life Ins. Co.* v. *Pireno*, No. 81-389 (June 28, 1982), slip op. 5-6; *National Gerimedical Hospital & Gerontology Center* v. *Blue Cross*, 452 U.S. 378, 388-389 (1981); *Abbott Laboratories* v. *Portland Retail Druggists Association*, 425 U.S. 1, 11-12 (1976).

> [t]he First Amendment, far from providing an argument against application of the Sherman Act, * * * provides powerful reasons to the contrary. * * * Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.

Associated Press v. *United States*, 326 U.S. 1, 20 (1945). See also, *e.g.*, *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 800 n.18 (1978) ("application of the antitrust laws to newspapers is not only consistent with, but is actually supportive of the values underlying, the First Amendment"); *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139-140 (1969) (agreement between newspapers to fix prices, pool profits, and divide markets is not protected by First Amendment); *Lorain Journal* v. *United States*, 342 U.S. 143 (1951) (attempted monopolization by newspaper though selective refusal of advertising is subject to Sherman Act); *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U.S. 268 (1934) (plaintiff alleged a conspiracy to monopolize portion of farm paper business through manipulation of advertising rates).[5]

---

[5]Petitioner relies (Pet. 20) on *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), to argue that the Sherman Act does not regulate newspapers unless their First Amendment activities are a "sham." *Noerr*, however, dealt with the special problems raised by the First Amendment right to petition the government. That right, in many instances, cannot be effectively exercised except through concerted action. 365 U.S. at 136. In *Noerr*, this Court determined that Congress could not have intended the Sherman Act to interfere with the right to petition, when it is legitimately exercised by competitors acting in concert. 365 U.S. at 137-138. In contrast to *Noerr*, petitioner's activities at issue in this case do not involve petitioning the government. Consequently, the rationale of *Noerr* has no application to this case. The First Amendment's guarantee of freedom of the press

This Court has repeatedly rejected suggestions, such as petitioner makes here, that the Sherman Act should apply only in some diluted form to newspapers. In *Associated Press* v. *United States, supra,* 326 U.S. at 6, the argument was made "that newspaper publishers charged with combining cooperatively to violate the Sherman Act are entitled to have a different and more favorable kind of trial procedure than all other persons covered by the Act." This Court, however, concluded (326 U.S. at 7) that publishers:

> are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want. * * * All are alike covered by the Sherman Act. The fact that the publisher handles news while the others handle food does not * * * afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices.

Similarly, in *Lorain Journal* v. *United States, supra,* 342 U.S. at 155-156, this Court held that publishers are not immune from injunctions against attempted monopolization: "The injunction applies to a publisher what the law applies to others. * * * Injunctive relief under § 4 of the Sherman Act is as appropriate a means of enforcing the Act against newspapers as it is against others."

Petitioner characterizes its decision to refuse respondent's ads as "editorial" (Pet. i, 12, 19, 20), and thereby attempts to have this decision treated in the same manner as decisions about what news or opinion to publish. While this

---

does not require anticompetitive concerted action for its full realization. To the contrary, this Court held in *Associated Press* v. *United States, supra,* 326 U.S. at 19-20, that First Amendment values are actually promoted by application of the Sherman Act to anticompetitive activities by the press.

Court has suggested that the Sherman Act does not dictate what news a newspaper must publish (see *Associated Press* v. *United States, supra,* 326 U.S. at 20 n.18), advertising is commercial speech, not news. *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376, 388 (1973). Commercial speech can be banned if related to illegal activity (*Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557, 563-564 (1980)), and can be regulated in furtherance of important government interests, such as those represented by the antitrust laws (447 U.S. at 564; *Ohralik* v. *Ohio State Bar Association,* 436 U.S. 447, 456-459 (1978)). Here petitioner's decision to reject advertising was an integral part of alleged anticompetitive activity; it can therefore be regulated under the Sherman Act. See *Central Hudson Gas & Electric Corp.* v. *Public Service Commission, supra,* 447 U.S. at 564.

In sum, this Court consistently has refused to fashion an antitrust exemption for the newspaper industry's commercial dealings, including advertising decisions. There is no reason to reconsider that established precedent in this case.

2. Petitioner also argues (Pet. 21-26) that the court of appeals erred in determining that petitioner acted unreasonably in refusing to accept respondent's advertising. Petitioner contends that a monopolist[6] is not liable under the Sherman Act for actions that harm its competitors so long as those actions are reasonable business decisions. It argues (Pet. 24-26) that it could reasonably ban all advertisements for businesses charging a fee for rental information because

---

[6]Petitioner does not challenge the market definitions used by the court of appeals in determining that petitioner was a monopolist in the city zone market for daily newspapers carrying real estate rental information. Petitioner, moreover, concedes the "hypothetical possibility" of competition between itself and respondent in that market (Pet. 21). We therefore express no views on these issues.

such businesses mislead the public and bring a newspaper into disrepute. Petitioner's arguments on this point, however, are based on a factual disagreement with the court of appeals rather than on a dispute regarding applicable law.

There is no disagreement between petitioner and the court of appeals with respect to legal theory. The court did not hold that a firm with monopoly power could not engage in normal profit maximizing conduct — such as providing superior products or cutting prices — even if its competitors were hurt by such conduct. Indeed, the court agreed that a monopolist must have considerable freedom to make business decisions, as the court's earlier decision in the *Homefinders* case makes clear (Pet. App. A6). Petitioner's disagreement, therefore, is with the court of appeals' finding that petitioner's refusal to accept rental information advertising was an overly broad reaction to a business problem (*id.* at A4).[7]

The correctness of the court of appeals' factual conclusion that petitioner's refusal to deal was unreasonable is not a legal issue of general or recurring importance. On the basis of its factual finding of overly restrictive conduct by a firm with monopoly power, the court of appeals found that petitioner had used its monopoly power unreasonably. Under existing law, such conduct violates Section 2 of the Sherman Act (see, *e.g.*, *Mid-Texas Communications Systems, Inc.* v. *AT&T*, 615 F.2d 1372, 1389-1390 (5th Cir.), cert. denied, 449 U.S. 912 (1980); *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484, 488 (1st

---

[7]Petitioner claims (Pet. 22-23) that the decision below conflicts with the Fifth Circuit's decision in *Mid-Texas Communications Systems, Inc.* v. *AT&T*, 615 F.2d 1372, cert. denied, 449 U.S. 912 (1980). The two courts of appeals, however, agree that a reasonable business decision by a monopolist that hurts a competitor does not necessarily amount to a Sherman Act violation, and there is no indication that the Fifth Circuit would have reached a different result here.

Cir.), cert. denied, 344 U.S. 817 (1952); cf *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 377-378 (1973)), and there is no need for this Court to review the application of existing legal principles in the special factual setting of this case.[8]

Contrary to petitioner's suggestion (see, e.g., Pet. 19), the decision below is narrowly drafted and will not prevent newspapers from refusing misleading ads, ads that spawn complaints, or ads that affect the newspaper's good will. Nothing in the decision below, moreover, requires the

---

[8]In concluding that petitioner had violated Section 2, the court of appeals noted (Pet. App. A12), relying on *United States* v. *Griffith*, 334 U.S. 100, 105 (1948), that petitioner had used its monopoly power in one market to suppress competition in a separate market. Although the court may have reached the correct conclusion, its analysis, to the extent that it relied on *Griffith*, focused on the wrong question. In this case, the Providence Journal's monopoly position gave it control over whether there would be any market in Home Placement's type of rental referral service; it could block competition from Home Placement or any similar service simply by withholding advertising space. Such action does not necessarily violate the antitrust laws, as the court's prior decision in *Homefinders* made clear. The relevant question in this case, therefore, is whether there is sufficient economic justification for petitioner's blanket policy against accepting any advertising from rental referral agencies. This is also the fundamental issue implicit in tie-in cases, although the theory of restraint is generally based in such cases —as it is in this case — upon relatively imprecise notions of "leverage" or extension of market power from one market to another. As the First Circuit's reliance on *Griffith* illustrates, such theories can be misleading where the economic phenomenon being analyzed is not the transfer of market power, but a business decision that determines the precise form that competition will take (competition for sale of one product, or competition for each of the separate elements that comprise that product). Cf. *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 556-558 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961) (corporate decision to block development of new market in servicing of corporation's manufactured equipment held to be reasonable). The court of appeals' conclusion that petitioner acted without adequate justification appears correct and, in any event, does not raise any issue warranting review by this Court.

newspaper to deal with advertisers individually (see Pet. 13, 25); rather, the court of appeals' decision simply requires a monopoly newspaper to exercise care in defining categories of unacceptable advertising when the affected advertisers are competitors or potential competitors of the newspaper. The court of appeals' finding that petitioner's rental referral policy was an overly restrictive business decision is not clearly wrong, and accordingly does not warrant review by certiorari.[9]

3. Petitioner complains (Pet. 26-29) that the court of appeals set aside the district court's finding that petitioner acted reasonably without making the necessary ruling that the district court's finding of fact was clearly erroneous. The court of appeals, however, did find "clearly erroneous" the district court's conclusion that the Homefinders and Home Placement schemes were indistinguishable (Pet. App. A2). The court of appeals further stated that "[w]e cannot accept that the sale of rental information is an inherently or unfailingly deceptive practice, or that advertisements for such necessarily engender complaints which affect the good will of the advertising medium" (Pet. App. A5). These statements, read together with the remainder of the opinion, can reasonably be interpreted as a holding that the district court's finding of reasonableness was clearly erroneous. Accordingly, the court of appeals fully complied with Fed. R. Civ. P. 52.

---

[9]In ruling against petitioner, the court of appeals also held that petitioner had violated Section 1 of the Sherman Act. The court based this conclusion on its belief that the petitioner had conspired to "fix[] a maximum price of zero" (Pet. App. A8) on Home Placement's services. This is a dubious ground for finding a Section 1 violation; the court appears to have incorrectly confused price fixing with refusals to deal that, depending on their effect and purpose, may or may not violate the antitrust laws. Nevertheless, there is no reason to review the court's Section 1 analysis, since its reasoning concerning the Section 2 claim (monopolization) is sufficient to sustain the judgment below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

ABBOTT B. LIPSKY, JR.
Deputy Assistant Attorney General

JOHN J. POWERS, III
MARION L. JETTON
Attorneys

FEBRUARY 1983

DOJ-1983-02